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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF COLORADO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

The United States is currently responding to the release and threatened release of hazardous substances at the Department of the Army's Rocky Mountain Arsenal pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* The question presented is whether the State of Colorado may simultaneously dictate hazardous substance response activities at the site pursuant to state law.

PARTIES TO THE PROCEEDING

The United States of America is the petitioner. The State of Colorado and the Colorado Department of Health are respondents.

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STATE OF COLORADO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-40a) is reported at 990 F.2d 1565. The memorandum opinion and order of the district court (App., *infra*, 41a-52a) and the judgment of the district court (App., *infra*, 53a-54a) are unreported.

JURISDICTION

The court of appeals entered its decision on April 6, 1993, and it denied the United States' petition for rehearing on June 30, 1993. See App., *infra*, 1a, 55a-58a. Through orders signed on September 16, 1993, and October 20, 1993, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including

November 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, provides in relevant part:

> **(a) Removal and other remedial action by President**
> * * *
>
> (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment * * *, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance * * *.

42 U.S.C. 9604(a).

Section 113 of CERCLA provides in relevant part:

> **(h) Timing of review**
>
> No Federal court shall have jurisdiction under Federal law * * * to review any challenges to removal or remedial action selected under [Section 104 of CERCLA] in any action except one of the following:
>
> * * * * *
>
> (4) An action under [Section 310 of CERCLA] alleging that the removal or remedial action taken under [Section 104] was in violation of any requirement of this chapter. * * *

42 U.S.C. 9613(h).

Section 120(a) of CERCLA provides in relevant part:

(4) State laws

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned and operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. * * *

42 U.S.C. 9620(a)(4).

Section 122(e)(6) of CERCLA provides:

(6) Inconsistent response action

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. 9622(e)(6).

Other related CERCLA provisions are reproduced in the appendix to this petition. App., *infra*, 117a-149a.

STATEMENT

The United States is currently responding to the release and threatened release of hazardous substances at the Department of the Army's Rocky Mountain Arsenal pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* CERCLA provides extensive opportunities for state involvement in the response process. Respondents State of Colorado and Colorado Department of Health (hereinafter Colorado)

have nevertheless sought to assert direct control over cleanup of the site, independently of CERCLA, by issuing an administrative compliance order dictating response activities under the Colorado Hazardous Waste Management Act (CHWMA), Colo. Rev. Stat. §§ 25-15-301 *et seq.* (1989 & Supp. 1993). The United States District Court for the District of Colorado ruled that CERCLA precludes Colorado from enforcing its compliance order. See App., *infra,* 50a-51a. The court of appeals reversed the district court's judgment and vacated that ruling. *Id.* at 39a-40a.

1. Congress enacted CERCLA in response to committee reports recommending federal legislation to address the dangers posed by abandoned or inactive hazardous waste sites. See, *e.g.,* H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17-22 (1980). Those reports concluded that existing federal laws prospectively regulating hazardous waste disposal, including the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901 *et seq.,* were "clearly inadequate to deal with this massive problem." H.R. Rep. No. 1016, Pt. I, *supra,* at 17-18. Instead, separate legislation was necessary to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with [those] sites." *Id.* at 22. See App., *infra,* 5a-6a.

a. CERCLA's basic statutory framework has remained unchanged since its inception. See Pub. L. No. 96-510, 94 Stat. 2767. Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604. Section 105 directs that the NCP shall include a

National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue orders to compel liable persons to respond to releases or threats of release, 42 U.S.C. 9606, while Section 107 allows the United States to recover its response costs from liable parties, 42 U.S.C. 9607. Section 113 provides for judicial review in the federal courts. 42 U.S.C. 9613. Since its original enactment, CERCLA has also contained two so-called "savings" provisions, Sections 114(a) and 302(d), that preserve the power of States to create additional "liability," "requirements," or "obligations" with respect "to the release of hazardous substances." 42 U.S.C. 9614(a), 9652(d).[1]

b. Congress amended CERCLA in 1986 based on the experience that the United States had gained through implementation of the statute. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. The SARA amendments preserve the United States' primary role in addressing CERCLA sites, but they also require that the United States work in close cooperation with the States to produce prompt, efficient, and thorough CERCLA response actions. The amendments included the following new CERCLA provisions that are relevant to this case:

i. *Section 113(h) and (j).* Section 113(h) and (j) places specific limitations on judicial review of CERCLA response actions. Under those provisions, a federal district court generally lacks jurisdiction to review a chal-

[1] Section 101 of CERCLA defines many of the statute's pertinent terms, including "hazardous substance," "person," "release," "removal," "remedial action," and "response." See 42 U.S.C. 9601.

lenge to the federal government's selection of a response action until after the response action is finally completed, 42 U.S.C. 9613(h)(4); judicial review is limited to the administrative record, 42 U.S.C. 9613(j)(1); and the federal government's selection of a response action shall be upheld unless the objecting party shows that it was arbitrary and capricious or otherwise not in accordance with law, 42 U.S.C. 9613(j)(2).

ii. *Section 120.* Section 120 provides detailed guidance on the application of CERCLA to federal facilities. Section 120(a) basically specifies that CERCLA response mechanisms shall apply to those facilities. 42 U.S.C. 9620(a). Section 120(a)(4) further provides that "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at [federal] facilities * * * when such facilities are not included on the [NPL]." 42 U.S.C. 9620(a)(4). Section 120(c) and (d) then provides procedures guiding the federal government's decision whether to list a federal facility on the NPL. 42 U.S.C. 9620(c) and (d). Once a federal facility is listed on the NPL, it becomes subject to a detailed regime for federal response action, including provisions requiring the development of an interagency agreement (IAG) to govern the remedial action, provisions mandating that the Environmental Protection Agency (EPA) shall have final authority over selection of a remedy, provisions governing timing of the response action, and provisions allowing the States to participate extensively in the selection of a remedy. 42 U.S.C. 9620.[2]

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[2] For example, Section 120(e) requires any federal department, agency or instrumentality that owns or operates a facility on the NPL to enter into an IAG with the EPA to govern "all necessary remedial action" at the site concerned. 42 U.S.C. 9620(e). Section

iii. *Section 121.* Section 121 governs the selection of remedial actions at all CERCLA sites, including federal facilities. Section 121(a) through (c) basically requires the President to select remedial actions that are consistent with the NCP, are cost-effective, are protective of human health and the environment, and provide permanent solutions to the maximum extent practicable, including provisions for future monitoring if hazardous substances remain on the site. 42 U.S.C. 9621(a)-(c). In addition, Section 121(d) provides that the selected remedy, once completed, must achieve the level of cleanup specified pursuant to "applicable" or "relevant and appropriate" requirements (ARARs) under federal or state environmental law. 42 U.S.C. 9621(d). Section 121's so-called "ARARs" process gives the States an extensive role in the development, selection, and enforcement of the CERCLA remedy, see 42 U.S.C. 9621(d) through (f); however, Section 121(e)(1) expressly provides that "[n]o Federal, State, or local permit shall be required" for on-site removal or remedial actions. 42 U.S.C. 9621(e)(1).[3]

120(e)(4)(A) specifies that the EPA has final authority over the selection of any remedial action. 42 U.S.C. 9620(e)(4)(A). Section 120(e)(6) provides that if another party is potentially responsible under CERCLA and the EPA determines that the party will properly undertake remedial investigations and feasibility studies or remedial action, the EPA may enter into an agreement concerning remedial action with such party pursuant to Section 122 of CERCLA (discussed in text *infra*). 42 U.S.C. 9620(e)(6). Section 120(f) guarantees state officials an opportunity to participate in the planning and selection of remedial actions at federally owned NPL sites in accordance with Section 121 of CERCLA (discussed in text *infra*). 42 U.S.C. 9620(f). Section 120(g) prohibits the EPA from delegating its authority under Section 120 to any person outside of EPA. 42 U.S.C. 9620(g).

[3] Section 121(d) employs ARARs to provide a comprehensive mechanism for state input in planning the CERCLA response

iv. *Section 122.* Section 122 describes the President's authority to enter into agreements with private parties to perform CERCLA response actions and contains various provisions designed to encourage settlements. Section 122(e)(6) specifically provides that once the President, or a potentially responsible party acting pursuant to an administrative order or consent decree, has initiated a remedial investigation and feasibility study at a site, no potentially responsible party may take any remedial action at the site unless the President has authorized that action. 42 U.S.C. 9622(e)(6).

c. CERCLA vests most of the federal authority contained therein in the President, who in turn has delegated authority to the Administrator of the EPA and other federal officials, including the Secretary of Defense. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

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action. See 42 U.S.C. 9621(d). In addition, Section 121(e)(2) expressly allows the States to enforce the ARARs once a remedy is selected. See 42 U.S.C. 9621(e)(2). More generally, Section 121(f)(1) directs that the President must allow the States "substantial and meaningful involvement" in remedy development and selection and describes in elaborate detail the States' role. 42 U.S.C. 9621(f)(1). Section 121(f)(2) and (3) additionally provides that if the President waives an ARAR pursuant to Section 121(d)(4), a State may seek judicial review in federal district court challenging that decision. See 42 U.S.C. 9621(d)(4), (f)(2) and (3). Section 121(f)(3) specifically addresses a State's right to judicial review with respect to federal facilities. 42 U.S.C. 9621(f)(3). That provision directs that if the State establishes that the President's decision with respect to the ARAR is not supported by substantial evidence, then the remedy must be modified to conform to the ARAR. But even if the State fails to make that showing and the court upholds the President's remedy selection, the State may still require compliance with the ARAR at issue "if the State pays, within 60 days of judgment, the additional costs attributable to meeting" the ARAR. 42 U.S.C. 9621(f)(3)(B).

The EPA has primary authority for implementing CERCLA, which it exercises in part through the NCP. The EPA has revised the NCP in light of the SARA amendments, and the revised NCP provides extensive guidance on the ARARs process. See 40 C.F.R. Pt. 300; 55 Fed. Reg. 8666 (1990); see also *Ohio* v. *United States EPA*, 997 F.2d 1520 (D.C. Cir. 1993) (rejecting various challenges to the revised NCP). In addition, the EPA has provided guidance on the CERCLA response process through its Listing Policy for Federal Facilities, 54 Fed. Reg. 10,520 (1989).

2. When Congress enacted CERCLA, it had already created a federal permitting scheme, embodied in RCRA, to regulate prospectively the treatment, storage, and disposal of hazardous wastes. See p. 4, *supra*. RCRA was widely recognized at that time as " 'clearly inadequate' to deal with 'the inactive hazardous waste site problem.' " App., *infra*, 5a-6a. RCRA, however, has since been amended and strengthened in significant respects. See Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221. RCRA currently imposes extensive regulatory requirements on owners and operators of hazardous waste facilities, including federal facilities, and those requirements provide a backdrop for the dispute in this case.

a. Section 3005 of RCRA requires that hazardous waste facilities be operated only in accordance with a RCRA-based permit. See 42 U.S.C. 6925; 40 C.F.R. Pt. 270. Recognizing that the EPA could not issue permits to all applicants before the effective date of the relevant portions of RCRA, Congress provided that facilities in existence on November 19, 1980, could obtain "interim status," allowing them to continue operating until final action was taken on their permit applications. 42 U.S.C.

6925(e). Section 3008(h) of RCRA authorizes the EPA to order corrective action where there has been a release of hazardous wastes at facilities operating in interim status. 42 U.S.C. 6928(h).

b. Under the EPA's regulations, a "RCRA permit application consists of two parts," Part A and Part B. 40 C.F.R. 270.1(b). Timely submission of Part A of the permit application qualifies facilities for interim status, and such facilities are then "treated as having been issued [a] permit" until a final permit determination is made. 42 U.S.C. 6925(e); 40 C.F.R. 270.1(b). See *EPA* v. *Environmental Waste Control, Inc.*, 917 F.2d 327, 330 (7th Cir. 1990), cert. denied, 499 U.S. 975 (1991). Facilities must then file a more detailed Part B, and upon successful completion of that process, the facility receives a final permit. 42 U.S.C. 6925(a)-(c); 40 C.F.R. 270.1(b); *Environmental Waste Control, Inc.*, 917 F.2d at 330.

c. A State may petition the EPA for authorization to administer and enforce a state hazardous waste program "in lieu of" the federal RCRA program, provided that the State satisfies certain requirements. See RCRA § 3006, 42 U.S.C. 6926; 40 C.F.R. Pt. 271. Federal agencies generally must comply with the state program requirements "to the same extent" as other persons. RCRA § 6001, 42 U.S.C. 6961. Effective November 2, 1984, EPA authorized Colorado to begin administration of its own hazardous waste management program—namely, the CHWMA, Colo. Rev. Stat. §§ 25-15-301 *et seq.* (1989 & Supp. 1993). See 49 Fed. Reg. 41,036 (1984). Colorado has adopted CHWMA regulations that largely mirror the EPA's RCRA regulations. See Colo. Code Regs. 1007-3 Pts. 261, 264, and 265.

3. The Rocky Mountain Arsenal is a 27-square-mile Department of the Army facility located near Denver,

Colorado. Portions of the site were contaminated by a variety of hazardous substances resulting from Army production of chemical warfare agents during and after World War II and pesticide production by a government lessee, Shell Oil Company, commencing in the 1950s. The Arsenal has spawned a number of different environmental suits. The central question in this case is who has authority to determine the appropriate remedy for the site: the United States pursuant to CERCLA, or the State of Colorado pursuant to the CHWMA. The issue has arisen in the context of the remediation of Basin F, a 92.7-acre lined basin used for disposal of liquid wastes between 1956 and 1982. See App., *infra*, 2a-3a.

a. In November 1980, before enactment of CERCLA, the Army concluded that the Arsenal was subject to RCRA's permitting requirements. The Army submitted Part A of a RCRA permit application to the EPA and thereby achieved interim status for Basin F. The Army subsequently submitted Part B of the permit application, which included a closure plan for Basin F. However, in May 1984, the EPA concluded that the application was deficient and directed the Army to submit a revised Part B application. Before the revised application was completed, the Army began to address the hazards posed by the site through CERCLA. In October 1984, the Army commenced a remedial investigation/feasibility study (RI/FS) pursuant to CERCLA, and in June 1986, the Army announced that it was taking a CERCLA interim response action with respect to Basin F. See App., *infra*, 8a-9a, 10a-11a.

b. Meanwhile, in November 1984, the EPA concluded that Colorado's CHWMA permitting program was consistent with RCRA, and the EPA authorized Colorado to conduct that program "in lieu of" the federal RCRA

permitting program. When Colorado assumed authority over RCRA matters within its borders, the Army provided Colorado with the Part B permit application revised in response to the EPA's notice of deficiency.[4] The Army subsequently informed Colorado that, in the Army's view, initiation of a CERCLA response action precluded Colorado from independently enforcing state hazardous waste law at the Arsenal. Nevertheless, in 1986, Colorado issued a Basin F closure plan and brought suit in state court to enforce certain CHWMA provisions. The Army removed the action to federal district court. In November 1987, Colorado amended its complaint to seek enforcement of the State's closure plan for Basin F. See App., *infra*, 9a-10a.

c. While Colorado's suit was pending in federal district court, the United States moved forward to respond to Basin F—one of the most immediate hazards posed by the Rocky Mountain Arsenal. The EPA, the Army, and Shell Oil Company worked with Colorado to reach an agreement pursuant to CERCLA on an interim response for Basin F. But when the Army requested Colorado to identify ARARs and comment on the Army's proposed plan pursuant to Section 121(d) and (f)(1) of CERCLA (see pp. 7-8 & n.3, *supra*), Colorado did not respond. In January 1988, the Army issued its decision document for the Basin F response, and by December

[4] The court of appeals stated that the Army submitted "the same deficient application that the Army submitted to the EPA." App., *infra*, 9a-10a. That statement is incorrect. The Army explained in an accompanying transmittal letter that the revised application included the original Basin F closure plan as an appendix for purposes of completeness only and that the closure plan was being reevaluated as part of the CERCLA process commenced in October 1984.

1988, the Army had completed much of the interim response. See App., *infra,* 11a-12a.[5]

d. In February 1989, the district court ruled that Colorado could pursue its CHWMA enforcement action against the Army. *Colorado* v. *Department of the Army,* 707 F. Supp. 1562 (D. Colo.). The court relied in part on the fact that Section 120(a)(4) of CERCLA provides that state laws concerning removal and remedial action, "including State laws regarding enforcement," shall apply to response actions at federal facilities "when such facilities are not included on the National Priorities List," 42 U.S.C. 9620(a)(4). See 707 F. Supp. at 1569-1570. See p. 6, *supra.* Although the EPA had listed most of the Rocky Mountain Arsenal on the NPL, see 52 Fed. Reg. 27,620, 27,641 (1987), the EPA had failed to include Basin F because of uncertainty regarding the RCRA status of that unit. The EPA resolved that uncertainty and proposed to add Basin F to the Rocky Mountain Arsenal listing. 52 Fed. Reg. 27,643, 27,646 (1987). This expansion of the Arsenal listing did not become final until March 1989. 54 Fed. Reg. 10,512, 10,515-10,516 & n.2 (1989). At that time, the Army sought reconsideration of the district court's decision. App., *infra,* 12a-13a & n.12, 15a n.15.

e. On September 1, 1989, Colorado issued a 259-paragraph final amended compliance order (FACO). App., *infra,* 59a-116a. The FACO charged that the Army's

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[5] Although the initial phase of the interim action was completed in early 1989, substantial work remains to be done. Liquids removed from the basin are currently being incinerated as the second phase of the interim response. Final disposition of solids removed from the basin, and now stored in a wastepile, and of less contaminated soils left in place, will be determined as part of the final CERCLA record of decision to be issued in late 1994.

response activities at Basin F constituted 42 separate violations of the CHWMA. *Id.* at 64a-104a.[6] The FACO specifically ordered the Army to submit an amended Basin F closure plan—including detailed work, contingency, and inspection plans and schedules—for Colorado's approval. *Id.* at 104a-112a. It also ordered the Army to pay various fees, submit a revised permit application, provide additional site information, and build an emergency containment structure. *Id.* at 112a-115a. The FACO expressly directed that the Army "shall not implement any work plan, closure plan, or post-closure plan prior to approval by [Colorado]." *Id.* at 109a.[7]

f. The focus of the dispute between the United States and Colorado returned to federal district court. The United States sought a declaration from the district court that CERCLA precludes Colorado from directing the Army's Basin F response activities, while Colorado requested the court to enforce the FACO. The district court ruled that Colorado lacked authority to dictate

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[6] Those violations included alleged failures to: comply with or seek amendment of Colorado's Basin F closure plan, App., *infra*, 64a-67a (violations 1-3); obtain interim status or state permits for response actions, *id.* at 67a-73a (violations 4-9); pay associated fees, *id.* at 73a-75a (violations 10-12); respond to a tank release, *id.* at 75a-77a (violations 13-15); provide access to records, *id.* at 78a-81a (violation 16); perform adequate inspections, *id.* at 82a-93a (violations 17-34); provide notification of leaks, *id.* at 93a-98a (violations 35-37); remedy liners, *id.* at 98a-99a (violations 38-39); prepare and distribute a contingency plan, *id.* at 99a-102a (violations 40-41); and maintain adequate operating records, *id.* at 102a-104a (violation 42).

[7] The FACO further noted that the Army would be subject to civil penalties of as much as $25,000 per day for each violation of the CHWMA or the FACO. App., *infra*, 115a.

response actions at Basin F and it enjoined Colorado from enforcing the FACO. App., *infra*, 41a-52a. The court reasoned that Section 113(h) of CERCLA, which restricts federal court review of CERCLA remedial action prior to completion, "unambiguously indicates that this court lacks jurisdiction for pre-completion review of the remedial action presently underway at Basin F now that it has been placed on the NPL." App., *infra*, 48a-49a. The court explained that "[a]ny attempt by Colorado to enforce the CHWMA would require this court to review the remedial actions selected under [CERCLA] prior to their completion." *Id.* at 50a. See *id.* at 14a-16a.[8]

g. The court of appeals reversed the district court's ruling. App., *infra*, 1a-40a. The court of appeals first held that Section 113(h) of CERCLA is inapplicable because Colorado's attempt to enforce the FACO "is not a 'challenge' to the Army's CERCLA response action." App., *infra*, 19a. The court next stated that Section 120(a)(4) of CERCLA, which addresses the application of state law to federal facilities, is inapplicable, reasoning that the CHWMA is not "a state law 'concerning removal and remedial action.' " App., *infra*, 30a. The court of appeals acknowledged that Section 121 of CERCLA gives the States an extensive role in the selection of the CERCLA remedy, App., *infra*, 32a, that Section 121(e)(1) of CERCLA expressly prohibits States from imposing permit requirements on CERCLA response actions, App., *infra*, 35a, and that Section 122 of CERCLA prohibits unauthorized response actions at CERCLA sites, App., *infra*, 36a. The court nevertheless

[8] The district court also dismissed Colorado's previous enforcement action against the Army, see App., *infra*, 15a n.15, and entered a final judgment prohibiting Colorado from enforcing the FACO, *id.* at 53a-54a.

concluded that CERCLA's so-called savings provisions, Sections 114(a) and 302(d), allow Colorado to by-pass those provisions and dictate hazardous substance response actions at Basin F directly pursuant to state law. App., *infra*, 31a-40a.

REASONS FOR GRANTING THE PETITION

CERCLA creates a comprehensive federal mechanism for responding to releases of hazardous substances, including releases from federal facilities, and it creates an elaborate process for federal-state cooperation in the selection of appropriate response actions. The court of appeals' decision in this case holds that the CERCLA process is merely optional and that a State may directly control federal response activities at a CERCLA site by issuing compliance orders pursuant to state law. This Court should review that decision, because it presents a disagreement between the United States and a State on an important federal question, because it conflicts with decisions of other courts of appeals, and because it is incorrect.

1. Congress amended CERCLA to ensure that the United States could act promptly—and without litigation delays—in responding to the release and threatened release of hazardous substances. See CERCLA § 113(h) and (j), 42 U.S.C. 9613(h) and (j). But Congress also included detailed provisions in CERCLA specifying the role of the States in selecting appropriate response actions for federal and non-federal facilities. See CERCLA §§ 120-121, 42 U.S.C. 9620-9621. CERCLA provides a specific process—including the IAG and ARARs mechanisms—by which federal and state governments are to choose and implement responses cooperatively. CERCLA § 121(d)-(f), 42 U.S.C. 9621(d)-(f).

The United States and the State of Colorado disagree on the significance of CERCLA's detailed response process. In the United States' view, once a federal facility is listed on the NPL, that process provides the controlling mechanism for state involvement in the cleanup. In Colorado's view, the CERCLA process is simply an optional avenue for the State, which may bypass the process and independently impose its state laws directly on the site. This disagreement raises a question of nationwide importance. Indeed, 22 States appeared as amicus curiae in the court of appeals supporting Colorado's view that the States can proceed independently of the CERCLA process to take response actions at the site.

The dispute between the United States and Colorado is important for reasons beyond its inter-sovereign character. The question posed here is one of immense practical importance. The selection of a CERCLA remedy is an extraordinarily complex task. In determining the appropriate response, the CERCLA decision-maker must consider countless variables related to the character of the site, its surrounding environment, the substances that are present, and the current state of remedial technology. Based on those considerations, the CERCLA decision-maker must settle on a remedy that resolves numerous subsidiary issues, including whether to remove the hazardous substances from the facility or to contain or destroy them on-site; how to engineer the removal, containment or destruction; and what further monitoring, inspection, and limitations on future use are appropriate. If a State may simply sit out this decision-making process and then collaterally attack the CERCLA response action through a state compliance order, the result will be chaotic.

The problem is well illustrated by this case. The Rocky Mountain Arsenal is "one of the worst hazardous waste

pollution sites in the country." App., *infra*, 3a. Under the most conservative estimates, the total cost for cleaning up the Arsenal will exceed $1,700,000,000. Indeed, it may cost some multiple of that amount. The United States has undertaken an interim response at Basin F, which represents only one small portion of the Arsenal. But it has been impeded by Colorado's refusal to channel its input through CERCLA's ARARs process. The court of appeals' decision, which effectively holds that Colorado can bypass that process and then attack the Basin F interim response through state compliance orders, will result in further wasteful litigation and delay.

2. The court of appeals' decision in this case not only raises an important question of federal law; it also conflicts with decisions rendered by other courts of appeals. As a threshold matter, the court of appeals' interpretation of Section 113(h), which governs the manner and timing of judicial review of CERCLA response actions, is at odds with *Boarhead Corp.* v. *Erickson*, 923 F.2d 1011 (3d Cir. 1991), and *Schalk* v. *Reilly*, 900 F.2d 1091 (7th Cir.), cert. denied, 498 U.S. 981 (1990). See discussion at p. 21, *infra*. But the conflict of greatest practical significance is with the Sixth Circuit's decision in *United States* v. *Akzo Coatings of America, Inc.*, 949 F.2d 1409 (1991).

In *Akzo*, the United States and potentially responsible private parties reached agreement on the cleanup of the Rose Site in Oakland County, Michigan, and filed a proposed consent decree in federal district court. The State of Michigan filed a complaint in intervention objecting to entry of the consent decree and, in addition, requesting additional relief at the site under state law. See 719 F. Supp. 571 (E.D. Mich. 1989). The State specifically relied on the Michigan Water Resources Commission Act, Mich. Comp. Laws Ann. § 323.6 (West

1992), the Michigan Environmental Protection Act, Mich. Comp. Laws Ann. § 691.1201 *et seq.* (West 1992), and the common law of public nuisance, contending that

> the requirements for state participation in the EPA remedy selection process are supplementary to, not a substitute for, the State's continued right to enforce its environmental standards.

719 F. Supp. at 579. The district court rejected that argument, concluding that "Congress intended CERCLA to preempt state claims to the extent that they are in conflict with the federal statute" and that Michigan could participate in the remedy selection through the ARAR process, but it could not impose its own requirements upon the private parties "in addition to the EPA's settlement." *Id.* at 580. The Sixth Circuit agreed. That court "eschew[ed] use of the word preemption in this context"—because CERCLA preserves and applies state environmental standards through its comprehensive response process—but the court nevertheless concluded that CERCLA precludes imposition of "independent state remedies" once a CERCLA action is underway. 949 F.2d at 1458.

The *Akzo* decision conflicts with the court of appeals' decision in this case, which squarely rejects the United States' submission that CERCLA "bars Colorado from enforcing state law independent of CERCLA." App., *infra,* 31a. The court of appeals attempted to distinguish *Akzo* on the ground that

> [u]nlike the state in *Akzo Coatings,* Colorado is asserting its independent EPA-delegated RCRA authority rather than challenging the selection of a CERCLA remedy.

Id. at 34a n.21. The court is mistaken, however, in its characterization of that case. As the lower court's deci-

sion in *Akzo* makes clear, Michigan claimed that it was asserting independent state law in addition to challenging the remedy selection. See 949 F.2d at 1458; 719 F. Supp. at 579. Furthermore, under the decision below, it is immaterial whether Colorado is asserting "EPA-delegated RCRA authority" or some other form of state environmental law. The court of appeals based its decision on CERCLA's savings provisions, Sections 114(a) and 302(d), which make no distinction between "EPA-delegated RCRA authority" and other state law. 42 U.S.C. 9614(a) and 9652(d). See App., *infra*, 31a.[9]

3. The court of appeals' decision warrants review for the additional reason that it is erroneous. The question whether Colorado can enforce its compliance order at Rocky Mountain Arsenal turns on three subsidiary issues: (a) the courts' jurisdiction to review CERCLA response actions; (b) the State's role in selecting a CERCLA remedy; and (c) the State's power to dictate unauthorized activities at a CERCLA site. CERCLA addresses each of those issues, and in each instance it poses a bar to Colorado's action.

a. At the threshold, CERCLA imposes a jurisdictional limit on the manner and timing of federal district court challenges to CERCLA response actions. Section 113(h) expressly provides that no federal court shall have jurisdiction to review "any challenges to removal or remedial action" selected under CERCLA except

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[9] Indeed, *Akzo* highlights how state assertions of independent state law would not only disrupt federal cleanup efforts, but would additionally disrupt settlements with private responsible parties in contravention of the policy, reflected in Section 122 of CERCLA, of encouraging the parties that created the hazardous conditions to take responsibility for the site conditions and to complete expeditious cleanups themselves. See 42 U.S.C. 9622.

through five specific avenues, none of which is applicable here. 42 U.S.C. 9613(h).[10] Thus, Section 113(h) bars Colorado's attempt to enforce the FACO if Colorado's request for relief is a "challenge" to the United States' CERCLA response action at Basin F. Colorado's attempt to enforce the FACO is such a "challenge," because the FACO would expressly prohibit the response action from proceeding. See, *e.g.*, App., *infra*, 109a (directing that the Army "shall not implement any work plan, closure plan, or post-closure plan" without Colorado's approval).

The court of appeals concluded otherwise, stating that Colorado's FACO

> does not seek to halt the Army's Basin F interim response action; rather it merely seeks the Army's compliance with CHWMA during the course of the action, which includes [Colorado's] approval of the Basin F closure plan prior to implementation.

App., *infra*, 21a. That purported distinction, however, is mere word play. Colorado seeks to prevent the United States from implementing its CERCLA response action until Colorado approves it, and that amounts to a "challenge" to the response action under Section 113(h). See *Boarhead*, 923 F.2d at 1013-1014 (holding that Section 113(h) prohibits a suit under the National Historic Preservation Act of 1966 to enjoin a CERCLA response action); *Schalk* v. *Reilly*, 900 F.2d at 1097 (holding that Section 113(h) prohibits a suit under the National Environmental Policy Act that would "impact the implementation" of a CERCLA remedy).

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[10] The most nearly applicable avenue, set forth in Section 113(h)(4), allows an action under CERCLA's citizen suit provision, Section 310, once the response action has been completed. 42 U.S.C. 9613(h)(4). Colorado, however, has not brought a citizen suit and the response action has not been completed.

b. The court of appeals' misunderstanding of Section 113(h) leads directly to our second and more fundamental point. CERCLA does not simply restrict the power of federal courts as to the manner or timing of judicial challenges; it also provides the States with a full opportunity to participate in the remedy selection process. CERCLA contains detailed provisions that give the States a direct voice in the selection of CERCLA response actions—including federal facility response actions—and that provide a framework to resolve issues that would otherwise result in protracted litigation. Thus, if Colorado seeks "compliance with [the] CHWMA," App., *infra*, 21a, it need only participate in CERCLA's response process.

As its name indicates, CERCLA creates a *comprehensive* scheme for responding to releases of hazardous substances. See pp. 4-9, *supra*. The statute spells out in painstaking detail the respective roles of the United States and the States in developing response actions at federal and non-federal facilities. In the case of federal facilities such as the Rocky Mountain Arsenal, Section 120 provides (among other things) that:

- Federal agencies are subject to CERCLA's substantive and procedural requirements (CERCLA § 120(a));
- The EPA shall determine within a specified time period whether federal facilities warrant inclusion on the NPL (CERCLA § 120(c)-(d));
- Once a federal facility is placed on the NPL, the federal agency responsible for the facility must develop and implement an EPA-approved response action within time frames set by CERCLA and EPA (CERCLA § 120(e)); and
- State and local officials are entitled to participate in the planning and selection of the federal remedial

action in accordance with CERCLA's Section 121 (CERCLA § 120(f)).

See 42 U.S.C. 9620. Thus, once the EPA elects to place a federal facility on the NPL, the State has a direct role in the remedy selection process through Section 121, which specifies that:

- The EPA must promulgate regulations providing for "substantial and meaningful" state involvement in the remedy selection process (CERCLA § 121(f));
- The selected remedy must satisfy all "applicable" or otherwise "relevant and appropriate" requirements (ARARs) under federal *and* state law—such as the substantive requirements of Colorado's CHWMA—unless the EPA waives an ARAR requirement based on one of several specified grounds (CERCLA § 121(d));
- If the EPA waives an ARAR, then the State may bring a judicial action challenging the EPA's decision, and even if the court agrees with the EPA's decision, the State may nonetheless insist on compliance with the ARAR if the State pays the costs associated with satisfying the ARAR (CERCLA § 121(f)(3)).

See 42 U.S.C. 9621; see also 40 C.F.R. Pt. 300. Thus, CERCLA expressly addresses the State's role in determining the CERCLA response. CERCLA provides that once the EPA places a federal facility on the NPL, the States directly participate in the selection and implementation of federal response actions. But if the EPA has not placed a federal facility on the NPL, then "State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply." 42 U.S.C. 9620(a)(4).

In this instance, the EPA has placed Basin F on the NPL and the Army has undertaken CERCLA response actions. Thus, if Colorado wishes to obtain "compliance with CHWMA during the course of the action" (App., *infra,* 21a), it must participate in CERCLA's response process rather than attempt to impose "independent state remedies" that are inconsistent with the CERCLA remedy. See *Akzo,* 949 F.2d at 1458. Significantly, Section 121(e)(1) expressly prohibits Colorado from subjecting the CERCLA response action to permitting requirements such as the ones contained in Colorado's FACO. Compare 42 U.S.C. 9621(e)(1) with App., *infra,* 67a, 69a, 72a, 113a.

The court of appeals mistakenly reached a contrary conclusion on the basis of CERCLA's savings provisions, Section 114(a) and Section 302(d), which provide:

> Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. 9614(a).

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. 9652(d).

The court's error arose from its failure to read those provisions in context. To be sure, CERCLA does not disable the States from imposing "liabilities," "require-

ments," and "obligations" respecting the "release of hazardous substances," but where a CERCLA response action is ongoing, CERCLA does require that the applicable state laws shall be incorporated into the CERCLA response action through CERCLA's remedy selection process set forth in Sections 120 and 121. See *Akzo*, 949 F.2d at 1458. Simply put, CERCLA's savings provisions do not allow a State to bypass CERCLA's comprehensive statutory process for assimilating state law. Indeed, if a State could simply bypass the ARARs process and unilaterally impose state law requirements through state compliance orders, the ARARs process would become a dead letter.

c. The existence of CERCLA's comprehensive response process brings us to our third point. CERCLA leaves no doubt that this process is the exclusive means by which a State may direct the selection of a CERCLA remedy, because CERCLA prohibits any person—including a State—from dictating unauthorized response activities at a CERCLA site. Section 122(e)(6) states:

> When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. 9622(e)(6). Under that provision, once the CERCLA remedy selection process has led to the initiation of a remedial investigation and feasibility study, a potentially responsible party must obtain the EPA's approval before undertaking any remedial action. Thus, once the process has reached that stage, the State may not unilaterally compel a potentially responsible party

(including, in this case, the Army) to take remedial action.

The court of appeals rejected the comon sense import of Section 122(e)(6), concluding that it was inconsistent with CERCLA's savings clauses. See App., *infra*, 37a. Of course, the court of appeals' duty was to reconcile these statutory provisions, rather than to interpret them as conflicting. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). In any event, the court of appeals is mistaken. As the EPA has explained in its Listing Policy for Federal Facilities,

> CERCLA section 122(e)(6) does not constitute a prohibition on RCRA correction action at CERCLA sites; rather, it provides a mechanism by which the Agency must approve of remedial actions commenced at sites after an RI/FS has been initiated under CERCLA. * * * The Agency * * * intends to authorize many State RCRA actions to continue, e.g., where the RCRA action addresses a unit distinct from the CERCLA contamination, and where the RCRA action will not disrupt CERCLA activities.
>
> * * * * *
>
> Even where EPA decides that it is not appropriate to authorize a RCRA or other State action to continue under CERCLA section 122(e)(6) in order to avoid disruption or duplicative actions, CERCLA section 120(f) specifically provides that participation by State officials in remedy selection "shall be provided in accordance with section 121," and CERCLA section 121(d) specifically provides a process for taking account of "applicable or relevant and appropriate requirements" (ARARs) of RCRA (as well as other State and Federal statutes) when a remedy is selected.

54 Fed. Reg. 10,520, 10,523 (1989).

Thus, the court once again misconceived the significance of CERCLA's substantive provisions governing response actions. That error, like the others, warrants correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

No. 91-1360

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF COLORADO AND COLORADO DEPARTMENT OF HEALTH, DEFENDANTS-APPELLANTS

STATE OF ALASKA, STATE OF ARKANSAS, STATE OF CALIFORNIA, STATE OF CONNECTICUT, STATE OF INDIANA, STATE OF IOWA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF MISSOURI, STATE OF NEBRASKA, STATE OF NEVADA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH CAROLINA, STATE OF OHIO, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF TENNESSEE, STATE OF UTAH, AND STATE OF WYOMING, AMICI CURIAE

April 6, 1993
Rehearing Denied June 30, 1993

Before BALDOCK and HOLLOWAY, Circuit Judges, and EARL E. O'CONNOR, Senior District Judge.*

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* The Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

BALDOCK, Circuit Judge:

This case examines the relationship between the Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub.L. No. 94-580, 90 Stat. 2795, as amended by the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub.L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C. §§ 6901-6981 (West 1983 & Supp. 1992)), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 (Codified as amended at 42 U.S.C. §§9601-9675 (West 1983 & Supp. 1992) and 26 U.S.C. § 9507 (West Supp. 1992)). At issue is whether a state which has been authorized by the Environmental Protection Agency ("EPA") to "carry out" the state's hazardous waste program "in lieu of" RCRA, *see* 42 U.S.C. § 6926(b) (West Supp. 1992), is precluded from doing so at a hazardous waste treatment, storage and disposal facility owned and operated by the federal government which the EPA has placed on the national priority list, *see id.* § 9305(a))8)(B), and where a CERCLA response action is underway. *See* 42 U.S.C. § 9604 (West 1983 & Supp.1992).

I.

The Rocky Mountain Arsenal ("Arsenal") is a hazardous waste treatment, storage and disposal facility subject to RCRA regulation, *see* 42 U.S.C. § 6924(a) (West Supp.1992), which is located near Commerce City, Colorado in the Denver metropolitan area. The United States government has owned the Arsenal

since 1942, and the Army operated it from that time until the mid-1980's. Without reiterating its environmental history, suffice it to say that the Arsenal is "one of the worst hazardous waste pollution sites in the country." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1531 (10th Cir.1992) (footnote omitted). The present litigation focuses on Basin F which is a 92.7 acre basin located within the Arsenal where millions of gallons of liquid hazardous waste have been disposed of over the years.

A.

Congress enacted RCRA in 1976 "to assist the cities, counties and states in the solution of the discarded materials problems and to provide nationwide protection against the dangers of improper hazardous waste disposal." H.R.Rep. No. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249. RCRA requires the EPA to establish performance standards, applicable to owners and operators of hazardous waste treatment, storage and disposal facilities "as may be necessary to protect human health and the environment."[1] 42 U.S.C. § 6924(a) (West Supp.1992). The EPA enforces RCRA standards by requiring owners and operators of facilities

[1] Among the standards promulgated by the EPA are specific requirements governing the closure of hazardous waste treatment, storage and disposal facilities. *See* 40 C.F.R. § 264-228 (1992) (closure and post-closure care); *id.* § 265.228 (closure and post-closure care for interim status facilities). *See also* Donald W. Stever, *Law of Chemical Regulation and Hazardous Wastes*, § 5.06[2][d][iii][A], at 5-65 (1991).

to obtain permits,[2] *see* 42 U.S.C. § 6925 (West 1983 & Supp.1992), and by issuing administrative compliance orders and seeking civil and criminal penalties for violations. *Id.* § 6928. The EPA may authorize states to "carry out" their own hazardous waste programs "in lieu of" RCRA and to "issue and enforce permits for the storage, treatment, or disposal of hazardous waste" so long as the state program meets the minimum federal standards.[3] 42 U.S.C. § 6926(b) (West Supp.1992). *See also* H.R. Rep. No. 1491(I) at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6270 (under RCRA, states retain "primary authority" to implement hazardous waste programs). However, RCRA does not preclude a state from adopting more stringent requirements for the treatment, storage and disposal of hazardous waste. 42 U.S.C. § 6929 (West Supp.1992). *See also Old Bridge Chems., Inc. v. New Jersey Dep't of Envtl. Protection,* 965 F.2d 1287, 1296 (3d Cir.) ("RCRA sets a floor not a ceiling for state regulation of hazardous wastes"), *cert. denied,* __ U.S. ___, 113 S.Ct. 602, 121 L.Ed.2d 538 (1992). Once the EPA authorizes a state to carry out the state hazardous waste program in lieu of RCRA, "[a]ny action taken by [the] State [has] the same force and effect as action taken by the [EPA]...." 42 U.S.C. §

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[2] Pending permit approval, RCRA permitted preexisting hazardous waste treatment, storage and disposal facilities to continue operating during the permit application process under "interim status." 42 U.S.C. § 6925(e)(1) (West Supp. 1992).

[3] Congress encouraged states to develop their own hazardous waste programs by directing the EPA to "promulgate guidelines to assist States in the development of [such] programs." 42 U.S.C. § 6926(a) (West 1983).

6926(d) (West 1983). The federal government must comply with RCRA or an EPA-authorized state program "to the same extend as any person...."[4] 42 U.S.C. § 6961 (West 1983). In short, RCRA provides "a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society."[5] H.R. Rep. No. 1016(I), 96th Cong., 2d Sess. 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6120. *See also Old Bridge,* 965 F.2d at 1292 (RCRA is "principal federal statute regulating the generation, transportation, and disposal of hazardous wastes").

B.

Because RCRA only applied prospectively, it was "clearly inadequate" to deal with " 'the inactive haz-

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[4] In *United States Dep't of Energy v. Ohio,* __ U.S. ___, 112 S.Ct. 1627, 118 L.Ed.2d 255 (1992), the Supreme Court held that federal agencies retained sovereign immunity from state civil penalties imposed under RCRA. *Id.* at ___ _ ___, 112 S.Ct. at 1639-40. *See also Mitzelfelt v. Department of Air Force,* 903 F.2d 1293, 1296 (10th Cir. 1990). However, Congress recently amended § 6961 to clearly provide that federal agencies are not immune from such penalties. *See* Federal Facility Compliance Act of 1992, Pub.L. No. 102-386, § 102, 106 Stat. 1505.

[5] In 1984, Congress amended RCRA with the enactment of HSWA which sought to close "various loopholes" that were allowing millions of tons of hazardous waste to escape RCRA's control. *See* H.R. Rep. No. 198(I), 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S.C.C.A.N. 5576, 5578. Congress was concerned that RCRA was not being "conducted in a manner that controls and prevents present and potential endangerment to public health and the environment" and enacted HSWA to prevent "future burdens on the 'Superfund' program...." *id.* at 20, *reprinted in* 1984 U.S.C.C.A.N. at 5579.

ardous waste site problem.' " H.R. Rep. No. 1016(I), at 17-18, *reprinted in* 1980 U.S.C.C.A.N. at 6120. Consequently, Congress enacted CERCLA in 1980 "to initiate and establish a comprehensive reponse and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." *Id.* at 22, *reprinted in* 1980 U.S.C.C.A.N. at 6125. Among its provisions, CERCLA required the President to revise the "national contingency plan for the removal of . . . hazardous substances" which would "establish procedures and standards for responding to releases of hazardous substances...." 42 U.S.C. § 9605(a) (West Supp. 1992). *See also* 40 C.F.R. pt. 300 (1992). When "any hazardous substance is released or there is a substantial threat of such a release into the environment," CERCLA authorizes the President to

> act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . at any time . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a)(1) (West Supp.1992). CERCLA finances these government response actions through the Hazardous Substance Superfund, *see id.* § 961(a)(1); 26 U.S.C. § 9507 (West Supp.1992), and permits the government to seek reimbursement from responsible parties by holding them strictly liable. *Id.* § 9607(a). *See also* H.R.Rep. No. 1016, at 17, 1980 U.S.C.C.A.N. at 6120 (CERCLA establishes "a Federal cause of action in strict liability to enable [the

EPA] to pursue rapid recovery of the costs . . . of [reponse] actions"). *See, e.g., United States v. Hardage*, 982 F.2d 1436, 1443 (10th Cir.1992). CERCLA also requires the President to develop a national priority list, as part of the national contingency plan, which identifies "priorities among releases or threatened releases throughout the United States" for government response actions, *id.* § 9605(a)(8). *See* 40 C.F.R. pt. 300 App. B (1992), and the listing of a particular site on the national priority list is a prerequiste to a Superfund-financed remedial action at the site. 40 C.F.R. § 300.425(b)(1) (1992). We note that Superfund monies cannot be used for remedial actions at federal facilities, 42 U.S.C. § 9611(e)(3) (West Supp.1992), but CERCLA otherwise applies to the federal government "to the same extent, both procedurally and substantively, as any nongovernmental entity." *Id.* § 9620(a)(1). In short, CERCLA is a remedial statute "designed to facilitate cleanup of environmental contamination caused by releases of hazardous substances."[6] *Colorado v. Idorado Mining Co.*, 916 F.2d 1486, 1488, 1492 (10th Cir.1990), *cert. denied*, __ U.S. ___, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991). *See also Daigle*, 972 F.2d at 1533.

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[6] Congress amended CERCLA in 1986 by enacting SARA after realizing that CERCLA was "inadequate" to address the environmental threat presented by abandoned hazardous waste sites. *See* H.R.Rep. No. 253, 99th Cong., 2d Sess. 54-55 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836-37. SARA "buil[t] on existing law and significantly strengthen[ed] [CERCLA] in all respects . . . [as well as] provid[ing] the EPA with appropriate flexibility and discretion in order to respond appropriately to each site...." *Id.* at 56, *reprinted in* 1986 U.S.C.C.A.N. at 2838.

II.

In November 1980, the Army, as the operator of the Arsenal, submitted to the EPA part A of its RCRA permit application[7] which listed Basin F as a hazardous waste surface impoundment.[8] Appellants' App. at 413. By submitting the part A RCRA application, the Army achieved RCRA interim status. *See supra* note 2. In May 1983, the Army submitted part B of its RCRA permit application to the EPA which included a required closure plan for Basin F, Appellants' App. at 505, and the following month, the Army submitted a revised closure plan for Basin F. Appellants' App. at 471. *See also supra* notes 1 and 7. In May 1984, the EPA issued a notice of deficiency to the Army regarding part B of its RCRA permit application and requested a revised part B application within sixty

[7] Obtaining a RCRA permit is a two-step process. Part A of the permit application requires general information concerning the facility, the operator, the hazardous wastes and the processes for treatment, storage and disposal. *See* 40 C.F.R. § 270.13 (1992). Part B of the permit application requires more detailed information including a specific closure plan. *See id.* § 270.14.

[8] As a hazardous waste surface impoundment, Basin F is subject to specific RCRA regulations. *See* 40 C.F.R. §§ 265.220-265.230 (1992) (interim status standards for surface impoundments). Further, under HSWA, an interim status surface impoundment cannot receive, store, or treat hazardous waste after November 8, 1988, unless (1) it is in compliance with § 6924(*o*)(1)(A) which requires the "installation of two or more liners," a "leachate collection system," and "groundwater monitoring," or (2) it has at least one liner and there is no evidence that it is leaking, is located more than a quarter mile from an underground source of drinking water, and is in compliance with the groundwater requirements applicable to RCRA permitted facilities. *See* 42 U.S.C. § 6925(j) (West Supp. 1992). *See also id.* § 6924(*o*)(1).

days under threat of termination of the Army's interim status. Appellants' Br. Attach. 12. The Army never submitted a revised part B RCRA permit application to the EPA; rather, in October 1984, the Army commenced a CERCLA remedial investigation/feasibility study ("RI/FS").[9] Appellee's App. at 9, 30.

Effective November 2, 1984, the EPA, acting pursuant to 42 U.S.C. § 6926(b) (West Supp. 1992), authorized Colorado to "carry out" the Colorado Hazardous Waste Management Act ("CHWMA"), Colo.Rev. Stat. §§ 25-15-301 to 25-15-316 (1989 & Supp.1992), "in lieu of" RCRA. *See* 49 Fed.Reg. 41,036 (1984). That same month, the Army submitted its part B RCRA/CHWMA permit application to the Colorado Department of Health ("CDH") which is charged with the administration and enforcement of CHWMA. Appellants' App. at 473. Notably, the part B applica-

[9] While most of the President's CERCLA authority has been delegated to the EPA pursuant to 42 U.S.C. § 9615 (West 1983), the President delegated his CERCLA response action authority under § 9604(a-b) with respect to Department of Defense facilities to the Secretary of Defense. *See* Exec. Order No. 12,316, 46 Fed.Reg. 42,237 (1981), *as amended by* Exec. Order No. 12,418, 48 Fed.Reg. 20,891 (1983), *revoked by and current delegation of authority at* Exec. Order No. 12,580, 52 Fed.Reg. 2,923 (1987). A RI/FS is the first step in a CERCLA remedial action in order "to assess site conditions and evaluate alternatives to the extent necessary to select a remedy." 40 C.F.R. § 300.430(a)(2) (1992). Interestingly, the Army initiated the RI/FS during the month preceding HSWA's effective date, which provided that RCRA interim status surface impoundments undertake corrective action in order to continue treating, storing and disposing of hazardous waste after November 1988. *See supra* note 8. The Army has since maintained that its CERCLA response action precludes Colorado from enforcing its EPA-delegated RCRA authority at the Arsenal.

tion was the same deficient application that the Army submitted to the EPA in June 1983. *Id.* Not surprisingly, CDH found the application, specifically the closure plan for Basin F, to be unsatisfactory. *Id.*

Consequently, in May 1986, CDH issued its own draft partial closure plan for Basin F to the Army, *id.* at 481, and in October 1986, CDH issued a final RCRA/CHWMA modified closure plan for Basin F and requested the Army's cooperation in immediately implementing the plan. *Id.* at 393. The Army responded by questioning CDH's jurisdiction over the Basin F cleanup. *Id.* at 395-96.

In response to the Army's indication that it would not implement CDH's closure plan for Basin F, Colorado filed suit in state court in November 1986. Colorado sought injunctive relief to halt the Army's alleged present and future violations of CHWMA and to enforce CDH's closure plan for Basin F. The Army removed the action to federal district court, and moved to dismiss Colorado's CHWMA enforcement action claiming that "CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal." *Colorado v. United States Dept. of the Army,* 707 F.Supp. 1562, 1565 (D.Colo.1989).

In June 1986, the Army announced that it was taking a CERCLA interim response action with respect to Basin F. Appellee's App. at 20. In September 1986, the Army agreed with Shell Chemical Company[10] on an interim response action in which Shell

[10] From 1946 to 1982, Shell leased a portion of the Arsenal from the Army and disposed of hazardous wastes in Basin F.

would construct storage tanks with a total capacity of four million gallons to hold Basin F liquids. *Id.* In June 1987, the Army, the EPA, Shell and Colorado agreed on a Basin F interim response action which required the Army to remove contaminated liquids to the temporary storage tanks and contaminated sludges and soils to a temporary holding area until determination of a final Arsenal-wide remedy. *Id.* at 47-50. In August 1987, the Army requested that Colorado identify potential applicable or relevant and appropriate requirements ("ARAR's"), *see* 42 U.S.C. § 9621(d) (West Supp.1992); *infra* note 20, for the Basin F interim response action, and, in October 1987, the Army requested comment on its plan, *see* 42 U.S.C. § 9621(f)(1)(E) (West Supp.1992); however, Colorado did not respond to either of these requests. Appellee's App. at 21-22.

In October 1987, the Army advised Colorado that it was withdrawing its still pending part B RCRA/CHWMA permit application claiming that it was ceasing operations of all structures addressed in the application and that it intended to remediate Basin F pursuant to CERCLA. Appellants' App. at 398-400. The Army indicated that it would, however, comply with RCRA and CHWMA in accordance with CERCLA's provisions at 42 U.S.C. § 9620(i) and § 9621(d)(2)(A)(i). *Id.* at 399.

In December 1987, the Army transmitted a draft decision document for the Basin F interim response action to the EPA, Shell and Colorado and initiated a thirty day public comment period, *see* 42 U.S.C. § 9617 (West Supp.1992). Appellee's App. at 22. In January 1988, the Army issued its decision document for the Basin F interim response action. Appellants' App. at

5. Thereafter, the Army began the Basin F interim response action, and, in December 1988, completed the removal of eight million gallons of hazardous liquid wastes from Basin F, relocating four million gallons to three lined storage tanks and four million gallons to a double-lined holding pond. Appellee's App. at 12. In addition, the Army removed 500,000 cubic yards of contaminated solid material from Basin F, dried it, and placed it in a sixteen acre, double lined, capped wastepile. *Id.* The Army also capped the Basin F floor.[11] *Id.*

In February 1989, the federal district court denied the Army's motion to dismiss Colorado's CHWMA enforcement action. The district court relied on several provisions of both RCRA and CERCLA, including CERCLA's provision for the application of state laws concerning removal and remedial action at federal facilities not listed on the national priority list.[12] *Colorado v. United States Dep't of the Army,* 707

[11] The Basin F interim response action led several nearby residents to sue for damages allegedly caused by the release of airborne pollutants. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1532 (10th Cir.1992). The Basin F interim response action also calls for the Army to incinerate the removed liquids. This has yet to be done. Final disposition of the solids remaining under the Basin F cap and in the wastepile will be determined as part of the remedial action for which a final record of decision will be issued in 1994.

[12] Additionally, the district court relied on RCRA's provision regarding its application to federal facilities, 707 F.Supp. at 1565 (citing 42 U.S.C. § 6961), and its citizen suit provision, *Id.* at 1565-66 (citing 42 U.S.C. § 6972). The district court also relied on CERCLA's provisions permitting a state to impose additional requirements on the release of hazardous waste and preserving all other obligations or liabilities of persons under other federal or state law, *id.* at 1569 (citing 42 U.S.C. §§ 9614(a),

F.Supp. at 1569-70 (citing 42 U.S.C. § 9620(a)(4)). The district court found this provision to be particularly noteworthy in light of the fact that Basin F was not listed on the national priority list. *Id.* Furthermore, the district court expressed particular concern about the relationship between the Army and the EPA, noting that the EPA's "potential monitoring of the Army's Basin F cleanup operation under CERCLA does not serve as an appropriate or effective check on the Army's efforts,"[13] and that Colorado's involvement "would guarantee the salutary effect of a truly adversary proceeding that would be more likely, in the long run, to achieve a thorough cleanup." *Id.* at 1570. Thus, the district court held that Colorado was not precluded from enforcing CHWMA, pursuant to its EPA-delegated RCRA authority, despite the Army's cleanup efforts under CERCLA. *Id.*

In March 1989, the month following the district court's order, the EPA added Basin F to the national priority list.[14] 54 Fed.Reg. 10,512 (1989). The Army

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9652(d)), and CERCLA's provisions concerning federal facilities which indicated to the district court that CERCLA did not affect or impair the obligation of a federal facility to comply with RCRA. *Id.* (citing 42 U.S.C. §§ 9620(a)(1), 9620(a)(4), 9620(i)).

[13] The district court noted that the Army, as a responsible party, has an "obvious financial interest to spend as little money and effort as possible on the cleanup," whereas the EPA has the responsibility "to achieve a clean up as quickly and thoroughly as possible. . . ." 707 F.Supp. at 1570. The district court also noted that the same Justice Department attorneys were representing both the Army and the EPA despite the court's expressed concern over a conflict. *Id.*

[14] Although the EPA had listed the Arsenal on the national priority list in July 1987, 52 Fed.Reg. 27,620, 27,641 (1987),

immediately moved for reconsideration of the district court's order in light of the EPA's listing of Basin F on the national priority list.

In September 1989, CDH, acting in accordance with the district court's February 1989 order, issued a final amended compliance order to the Army, pursuant to CDH's authority under CHWMA. The final amended compliance order requires the Army to submit an amended Basin F closure plan, as well as plans and schedules addressing soil contamination, monitoring and mitigation, groundwater contamination, and other identified tasks for each unit containing Basin F hazardous waste as required under CHWMA. Appellants' App. at 96-103. The final amended compliance order also requires that CDH shall approve all plans and that the Army shall not implement any closure plan or work plan prior to approval in accordance with CHWMA. *Id.* at 98.

As a result of the final amended compliance order, the United States filed the present declaratory action, invoking the district court's jurisdiction under 28 U.S.C. § 2201. The United States' complaint sought

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Basin F was expressly excluded from the national priority list "because the EPA believed that Basin F might be subject to RCRA Subtitle C corrective action authorities and thus might be appropriate for deferral. . . ." 54 Fed.Reg. 10,512, 10,515 (1989). *See also* 48 Fed.Reg. 40,682 (1983) (describing EPA policy of deferring national priority listing of sites undergoing RCRA cleanup); 49 Fed.Reg. 40,323-40,324, 40,336 (1984). *See generally Apache Powder Co. v. United States,* 968 F.2d 66, 68 (D.C.Cir. 1992). When the EPA added Basin F to the national priority list in 1989, it indicated that Basin F should not have been deferred from listing under the policy in effect in 1987 because it had stopped receiving RCRA hazardous wastes prior to July 26, 1982 and did not certify closure prior to January 26, 1983. 54 Fed.Reg. at 10,515-10,516 & n.2.

an order from the federal district court declaring that the final amended compliance order is "null and void" and enjoining Colorado and CDH from taking any action to enforce it.[15] *Id.* at 13. Colorado counterclaimed requesting an injunction to enforce the final amended compliance order.[16] *Id.* at 35-41. On cross motions for summary judgment, the district court relied on CERCLA's provision which limits federal court jurisdiction to review challenges to CERCLA response actions, *see* 42 U.S.C. § 9613(h) (West Supp.1992), and held that "[a]ny attempt by Colorado to enforce [ ] CHWMA would require [the] court to review the [Army's CERCLA] remedial action . . . prior to [its] completion" and that "[s]uch a review is expressly prohibited by [CERCLA] § 9613(h)." *United States v. Colorado,* No. 89-C-1646, slip op. at 10 (D.Colo. Aug. 14, 1991) (Mem. Order & Op.). It is important to note that the district court distinguished its earlier order, which held that Colorado could enforce CHWMA despite the Army's CERCLA response

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[15] The United States filed the present action while the Army's motion for reconsideration of the district court's February 1989 order in Colorado's enforcement action was still pending. Following the district court's ruling in the present case, the district court dismissed Colorado's earlier enforcement action which was the subject of the district court's February 1989 order.

[16] Colorado also counterclaimed for civil penalties. The district court dismissed this counterclaim on sovereign immunity grounds, relying on this court's opinion in *Mitzelfelt v. Department of Air Force,* 903 F.2d 1293 (10th Cir.1990). *See United States v. Colorado,* No. 89-C-1646 (D.Colo. June 19, 1990) (order). Although Congress has subsequently amended RCRA to expressly allow for civil penalties to be enforced against federal facilities, *see supra* note 4, Colorado has not appealed the dismissal of its counterclaim for civil penalties.

action, *Colorado v. United States Dep't of the Army*, 707 F.Supp. at 1570, based on the EPA's intervening listing of Basin F on the national priority list. *United States v. Colorado*, No. 89-C-1646, slip op. at 4, 8, 1991 WL 193519. In doing so, the district court appears to have implicitly relied on § 9620(a)(4), which provides for the application of state laws concerning removal and remedial action at federal facilities not listed on the national priority list, in addition § 9613(h). Based on this reasoning, the district court granted summary judgment to the United States on its claims for declaratory and injunctive relief, denied Colorado's cross-motion for summary judgment, and enjoined Colorado and CDH from taking "any action to enforce the [ ] final amended compliance order." *Id.* at 10-11.

III.

Colorado filed a timely notice of appeal from the district court's order giving us jurisdiction over this matter. 28 U.S.C. § 1291. Colorado contends that § 9613(h) is not applicable to a state's efforts to enforce its EPA-delegated RCRA authority, that listing on the national priority list is immaterial, and that the district court's order amounts to a determination that CERCLA preempts a state's EPA-delegated RCRA authority contrary to well-settled principles.[17] In addition to arguing that § 9613(h) bars Colorado from enforcing its EPA-delegated RCRA authority, the

[17] Colorado also argues that the district court's order violates the separation of powers doctrine by allowing an executive branch agency to dictate the outcome of pending litigation. In light of our holding, we need not address this argument.

United States alternatively contends that CERCLA's provision, which grants the President authority to select the remedy and allow for state input through the ARAR's process, *see* 42 U.S.C. § 9621 (West Supp.1992), bars Colorado from enforcing state law independent of CERCLA. *See Hill v. Ibarra,* 954 F.2d 1516, 1525 n. 4 (10th Cir.1992) ("grant of summary judgment . . . may be upheld on any grounds supported by the record").

We review a district court order granting or denying summary judgment de novo, applying the same standard as the district court. *United States v. Hardage,* 985 F.2d 1427, 1432 (10th Cir.1993). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, we construe the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Hardage,* 985 F.2d at 1433.

As this is a case of statutory construction, our job is to effectuate the intent of Congress. *Colorado v. Idarado Mining Co.,* 916 F.2d 1486, 1494 (10th Cir.1990), *cert. denied,* __ U.S. __, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991). While our starting point is the statutory language, *Hallstrom v. Tillamook County,* 493 U.S. 20, 25, 28-29, 110 S.Ct. 304, 308, 309-311, 107 L.Ed.2d 237 (1989), we must also look to the design of the statute as a whole and to its object and policy. *Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990). *See also King v. St. Vincent's Hosp.,* __ U.S. __, __, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991) (statute must

be read as a whole because "meaning, plain or not, depends on context"). When Congress has enacted two statutes which appear to conflict, we must attempt to construe their provisions harmoniously. *Negonsott v. Samuels,* 933 F.2d 818, 819 (10th Cir. 1991), *aff'd,* __ U.S. __, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993). *See also County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation,* __ U.S. __, __, 112 S.Ct. 683, 692, 116 L.Ed.2d 687 (1992) ("Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is [our] duty . . . absent clearly expressed congressional intention to the contrary, to regard each as effective."). Even when a later enacted statute is not entirely harmonious with an earlier one, we are reluctant to find repeal by implication unless the text or legislative history of the later statute shows that Congress intended to repeal the earlier statute and simply failed to do so expressly. *United States v. Barrett,* 837 F.2d 933, 934 (10th Cir 1988). *See also Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 470, 102 S.Ct. 1883, 1892, 72 L.Ed.2d 262 (1982) ("an implied repeal must ordinarily be evident from the language or operation of the statute"). We turn now to the application of these well-settled rules of statutory construction to this particular case.

IV.

The district court focused on CERCLA's provision governing civil proceedings which grants federal courts exclusive jurisdiction over all actions arising under CERCLA. 42 U.S.C. § 9613(b) (West Supp. 1992). As the district court recognized, § 9613(h) ex-

pressly limits this grant of jurisdiction by providing, with exceptions not relevant here, that "[n]o Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title. . . ." *Id.* § 9613(h). However, contrary to the district court's reasoning, § 9613(h) does not bar federal courts from reviewing a CERCLA response action prior to its completion; rather, it bars federal courts from reviewing any "challenges" to CERCLA response actions. This is a critical distinction because an action by Colorado to enforce the final amended compliance order, issued pursuant to its EPA-delegated RCRA authority, is not a "challenge" to the Army's CERCLA response action. To hold otherwise would require us to ignore the plain language and structure of both CERCLA and RCRA, and to find that CERCLA implicitly repealed RCRA's enforcement provisions contrary to Congress' expressed intention.

A.

Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem. CERCLA's "savings provision" provides that "[n]othing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person[18] under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C.

[18] "Person" under CERCLA is defined to include the United States government. 42 U.S.C. § 9601(21) (West Supp. 1992).

§ 9652(d) (West 1983). Similarly, CERCLA's provision entitled "relationship to other laws" provides that "[n]othing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a) (West 1983). By holding that § 9613(h) bars Colorado from enforcing CHWMA, the district court effectively modified the Army's obligations and liabilities under CHWMA contrary to § 9652(d), and preempted Colorado from imposing additional requirements with respect to the release of hazardous substances contrary to § 9614(a).

As a federal facility, the Arsenal is subject to regulation under RCRA. *See* 42 U.S.C. § 6961 (West 1983). More importantly, because the EPA has delegated RCRA authority to Colorado, the Arsenal is subject to regulation under CHWMA. *Id. See also Parola v. Weinberger,* 848 F.2d 956, 960 (9th Cir.1988) (§ 6961 "unambiguously subjects federal instrumentalities to state and local regulation"). While the President has authority to exempt federal facilities from complying with RCRA or respective state laws "if he determines it to be in the paramount interest of the United States," 42 U.S.C. § 6961 (West 1983), noting in this record indicates that the Army has been granted such an exemption with respect to its activities at the Arsenal. Thus, Colorado has authority to enforce CHWMA at the Arsenal, and "[a]ny action taken by [Colorado] . . . [has] the same force and effect as action taken by the [EPA]. . . ." *Id.* § 6926(d).

Notwithstanding Colorado's RCRA authority over the Basin F cleanup, and CERCLA's express preservation of this authority, § 9613(h), which was en-

acted as part of SARA, limits federal court jurisdiction to review challenges to CERCLA response actions. Congress' expressed purpose in enacting § 9613(h) was "to prevent *private responsible parties* from filing dilatory, interim lawsuits which have the effect of slowing down or preventing the EPA's cleanup activities." H.R.Rep. No. 253(I), 99th Cong., 2d Sess. 266 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2941 (emphasis added). Nonetheless, the language of § 9613(h) does not differentiate between challenges by private responsible parties and challenges by a state. Thus, to the extent a state seeks to challenge a CERCLA response action, the plain language of § 9613(h) would limit a federal court's jurisdiction to review such a challenge. *See, e.g., Alabama v. EPA*, 871 F.2d 1548, 1557 (11th Cir.), *cert. denied*, 493 U.S. 991, 110 S.Ct. 538, 107 L.Ed.2d 535 (1989).

Be that as it may, an action by a state to enforce its hazardous waste laws at a site undergoing a CERCLA response action is not necessarily a challenge to the CERCLA action. For example, CDH's final amended compliance order does not seek to halt the Army's Basin F interim response action; rather it merely seeks the Army's compliance with CHWMA during the course of the action, which includes CDH approval of the Basin F closure plan prior to implementation. Thus, Colorado is not seeking to delay the cleanup, but merely seeking to ensure that the cleanup is in accordance with state laws which the EPA has authorized Colorado to enforce under RCRA. In light of §§ 9652(d) and 9614(a), which expressly preserve a state's authority to undertake such action, we cannot say that Colorado's efforts to enforce its EPA-delegated RCRA authority is a challenge to the Army's undergoing CERCLA response action.

The United States relies principally on two cases to support its claim that § 9613(h) bars any action by Colorado to enforce the final amended compliance order. In *Schalk v. Reilly,* 900 F.2d 1091 (7th Cir.), *cert. denied,* 498 U.S. 981, 111 S.Ct. 509, 112 L.Ed.2d 521 (1990), the Seventh Circuit held that § 9613(h) barred private citizens from bringing a CERCLA citizen suit which challenged a consent decree between the EPA and a responsible party on the grounds that failure to prepare an environmental impact statement violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* 900 F.2d at 1095. Responding to the citizens' argument that they were not challenging the remedial action but rather merely asking that certain procedural requirements be met, the court held that "challenges to the procedure employed in selecting a remedy nevertheless impact the implementation of the remedy and result in the same delays Congress sought to avoid by passage of the statute; the statute necessarily bars these challenges." *Id.* at 1097.

While we do not doubt that Colorado's enforcement of the final amended compliance order will "impact the implementation" of the Army's CERCLA response action, we do not believe that this alone is enough to constitute a challenge to the action as contemplated under § 9613(h). The plaintiffs in *Schalk* were attempting to invoke the federal court's jurisdiction under CERCLA's citizen suit provision. *See* 42 U.S.C. § 9659 (West Supp.1992). While one of the exceptions to § 9613(h)'s jurisdictional bar is for CERCLA citizen suits, such suits "may not be brought with regard to a removal where a remedial action is to be undertaken at the site." *Id.* § 9613(h)(4). Thus, the CERCLA

citizen suit in *Schalk* was jurisdictionally barred by the plain language of the statute. *See* 900 F.2d at 1095. *Accord Alabama v. EPA*, 871 F.2d at 1557. Unlike the plaintiffs in *Schalk*, Colorado has not asserted and need not assert jurisdiction under CERCLA's citizen suit provision to enforce the final amended compliance order; therefore, *Schalk*'s reasoning does not apply.

Nonetheless, the plain language of § 9613(h) bars federal courts from exercising jurisdiction, not only under CERCLA, but under *any* federal law to review a challenge to a CERCLA remedial action. *See* 42 U.S.C. § 9613(h) (West Supp.1992). In *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3d Cir.1991), the Third Circuit held that § 9613(h) barred the federal court from exercising federal question jurisdiction, 28 U.S.C. § 1331, under the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, in an action which sought to stay the EPA's CERCLA response action pending determination of whether property qualified for historic site status. 923 F.2d at 1021.

Like *Schalk*, *Boarhead* is also distinguishable from the present case. First, the plaintiff in *Boarhead* was a responsible party under CERCLA; therefore, permitting the plaintiff's action to proceed would have been contrary to Congress' expressed intent in enacting § 9613(h). Moreover, the plaintiff's complaint in *Boarhead* sought to stay the CERCLA remedial action; thus, the plaintiff's action under the Preservation Act clearly constituted a challenge to the CERCLA remedial action. *Boarhead*, 923 F.2d at 1015. *See also Alabama v. EPA*, 871 F.2d at 1559 (plaintiff's prayer for relief seeking to enjoin the EPA from participating in CERCLA remedial action "belie[d]" plaintiff's

assertion that it was not challenging the remedial action plan). Most importantly, the *Boarhead* court's application of § 9613(h) to the facts of that case did not "affect or modify in any way the obligations or liabilities" of a responsible party "under other Federal or State law . . . with respect to releases of hazardous substances," *see* 42 U.S.C. § 9652(d) (West 1983), and did not "preempt[ ] [the] state from imposing any additional liability or requirements with respect to the release of hazardous substances." *See id.* § 9614(a). In light of the plain language of §§ 9652(d) and 9614(a), and our responsibility to give effect to all of CERCLA's provisions, *Boarhead* cannot control this case.

B.

Not only is the district court's construction of § 9613(h) inconsistent with §§ 9652(d) and 9614(a) of CERCLA, it is also inconsistent with RCRA's citizen suit provision. *See* 42 U.S.C. § 6972 (West 1983 & Supp.1992). While CERCLA citizen suits cannot be brought prior to the completion of a CERCLA remedial action, *Schalk*, 900 F.2d at 1095, RCRA citizen suits to enforce its provisions at a site in which a CERCLA response action is underway can be brought prior to the completion of the CERCLA response action.

RCRA's citizen suit provision permits any person to commence a civil action against any other person, including the United States government or its agencies, to enforce "any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to" RCRA. 42 U.S.C. § 6972(a)(1)(A) (West Supp.1992). Such suits are

prohibited if the EPA or the state has already "commenced and is diligently prosecuting" a RCRA enforcement action. *Id.* § 6972(b)(1)(B). *See, e.g., Supporters to Oppose Pollution, Inc. v. Heritage Group,* 973 F.2d 1320, 1323-24 (7th Cir.1992). Federal courts have jurisdiction over such suits and are authorized "to enforce the permit, standard, regulation, condition, requirement, prohibition, or order. . . ." 42 U.S.C. § 6972(a) (West Supp.1992).

RCRA's citizen suit provision also permits any person to commence a civil action against any other person, including the United States government or its agencies, to abate an "imminent and substantial endangerment to health or the environment. . . ." *Id.* § 6972(a)(1)(B). These types of RCRA citizen suits are prohibited, not only when the EPA is prosecuting a similar RCRA imminent hazard action pursuant to 42 U.S.C. § 6973, but also when the EPA is prosecuting a CERCLA abatement action pursuant to 42 U.S.C. § 9606; the EPA is engaged in a CERCLA removal action or has incurred costs to initiate a RI/FS and is "diligently proceeding" with a CERCLA remedial action pursuant to 42 U.S.C. § 9604; or the EPA has obtained a court order or issued an administrative order under CERCLA or RCRA pursuant to which a responsible party is conducting a removal action, RI/FS, or remedial action. *Id.* § 6972(b)(2)(B). Federal courts have jurisdiction over RCRA citizen imminent hazard suits and are authorized "to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste. . . ." *Id.* § 6972(a).

By prohibiting RCRA citizen imminent hazard suits with respect to hazardous waste sites where a

CERCLA response action is underway, while not prohibiting RCRA citizen enforcement suits with respect to such sites, Congress clearly intended that a CERCLA response action would not prohibit a RCRA citizen enforcement suit. Because the definition of "person" under RCRA includes a state, 42 U.S.C. § 6903(15) (West 1983), Colorado could enforce RCRA in federal court by relying on RCRA's citizen enforcement suit provision, 42 U.S.C. § 6972(a)(1) (West Supp.1992), provided that it complied with the requisite notice provisions. *See id.* § 6972(b)(1)(A). *See also Hallstrom v. Tillamook County,* 493 U.S. 20, 26, 110 S.Ct. 304, 309, 107 L.Ed.2d 237 (1989) ("compliance with . . . notice provision is a mandatory . . . condition precedent for suit"). Because CHWMA became "effective" pursuant the EPA's delegation of RCRA authority to Colorado, and the final amended compliance order was issued pursuant to CHWMA, Colorado could arguably seek enforcement of the final amended compliance order in federal court pursuant to § 6972(a)(1). However, we need not decide this issue. While Colorado's counterclaim sought enforcement of the final amended compliance order in the district court, Colorado asserted the counterclaim solely under CHWMA, claiming that it was compulsory pursuant to Fed.R.Civ.P. 13(a), and seeking to invoke the district court's ancillary jurisdiction. *See* Appellants' App. at 30. Thus, we do not express any opinion on whether federal court jurisdiction over Colorado's counterclaim is proper under § 6972(a)(1)(A). Nonetheless, our discussion of this provision is relevant to our determination that Congress did not intend a CERCLA response action to bar a RCRA enforcement action, or an equivalent action by a state which has

been authorized by EPA to enforce its state hazardous waste laws in lieu of RCRA.

C.

Rather than challenging the Army's CERCLA remedial action, Colorado is attempting to enforce the requirements of its federally authorized hazardous waste laws and regulations, consistent with its ongoing duty to protect the health and environment of its citizens. CERCLA itself recognizes that these requirements are applicable to a facility during the pendency of a CERCLA response action. *See Moskal v. United States,* 498 U.S. 103, 109-10, 111 S.Ct. 461, 465-66, 112 L.Ed.2d 449 (1990) (statutes must be construed to give effect to "every clause and word"). Further, RCRA contemplates that enforcement actions may be maintained despite an ongoing CERCLA response action, and we cannot say that CERCLA implicitly repealed RCRA's enforcement provision given CERCLA's clear statement to the contrary. *See Manor Care, Inc. v. Yaskin,* 950 F.2d 122, 127 (3d Cir.1991) ("Congress did not intend for CERCLA remedies to preempt complementary state remedies."). While the decision to use CERCLA or RCRA to cleanup a site is normally a "policy question [ ] appropriate for agency resolution," *Apache Powder Co. v. United States,* 968 F.2d 66, 69 (D.C.Cir.1992), the plain language of both statutes provides for state enforcement of its RCRA responsibilities despite an ongoing CERCLA response action. Thus, enforcement actions under state hazardous waste laws which have been authorized by the EPA to be enforced by the state in lieu of RCRA do not constitute "challenges" to CERCLA response actions; therefore, § 9613(h) does

not jurisdictionally bar Colorado from enforcing the final amended compliance order.

V.

Even if an action by Colorado to enforce the final amended compliance order would be a "challenge" to the Army's CERCLA response action, the plain language of § 9613(h) would only bar a federal court from exercising jurisdiction over Colorado's action. Colorado, however, is not required to invoke federal court jurisdiction to enforce the final amended compliance order. Rather, Colorado can seek enforcement of the final amended compliance order in state court. Therefore, § 9613(h) cannot bar Colorado from taking "any" action to enforce the final compliance order.

The final amended compliance order was issued by CDH pursuant to its authority under CHWMA. CHWMA not only authorizes CDH to issue compliance orders, it also authorizes CDH to request the state attorney general to bring suit for injunctive relief or civil or criminal penalties. Colo.Rev.Stat. § 25-15-308(2)(a) (Supp. 1992). *See also id.* § 25-15-309 (administrative and civil penalties); *id.* § 25-15-310 (criminal offenses-penalties). *Compare* 42 U.S.C. § 6928(a)(1) (West Supp.1992) (authorizing the EPA to issue RCRA compliance orders, assess civil penalties, and bring civil enforcement action); *Id.* § 6928(d) (criminal penalties for knowing violations of RCRA). Unlike RCRA-enforcement suits by the EPA which must be brought in federal court, 42 U.S.C. § 6928(a)(1) (West Supp.1992), CHWMA enforcement actions must be brought in the state "district court for the district in which the site or facility is . . .

located" or in the "district in which the violation occurs." Colo.Rev.Stat. §§ 25-15-305(2)(b), 25-15-309(1) (Supp.1992). As the operator of a federal facility subject to regulation under CHWMA, the Army is subject to "process or sanction" of the Colorado state courts with respect to enforcement of CHWMA. 42 U.S.C. § 6961 (West 1983). Because Colorado may bring an enforcement suit in state court, § 9613(h) does not preclude Colorado from taking "any" action to enforce the final amended compliance order.

VI.

By distinguishing its February 1989 order, which recognized that Colorado could enforce CHWMA with respect to Basin F, from its order in this case, which enjoined Colorado and CDH from taking any action to enforce the final amended compliance, based on the EPA's subsequent placement of Basin F on the national priority list, the district court also appears to have implicitly relied on 42 U.S.C. § 9620(a)(4) (West Supp.1992). Section 9620 sets forth CERCLA's application to federal facilities. Subsection (a)(4) provides, in relevant part, that "[s]tate laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priority list." *Id.* Apparently, the district court construed this subsection as precluding the application or enforcement of state laws concerning removal or remedial action at federal facilities which are listed on the national priority list.

As the United States candidly concedes, the district court's application of § 9620(a)(4) is incorrect. *See* Appellee's Br. at 36. At most, § 9620(a)(4) determines the controlling law, not federal court jurisdiction over actions by a state. Moreover, the district court's reasoning regards CHWMA as a state law "concerning removal and remedial action." While we recognize that CERCLA's definition of "removal and remedial action" is conceivably broad enough to encompass certain RCRA corrective actions, *see* 42 U.S.C. §§ 9601(23), 9601(24) (West Supp.1992), we believe that had Congress intended § 9620(a)(4) to exclude states from enforcing their EPA-delegated RCRA responsibilities, it would have expressly said so. The district court's reasoning is contrary to § 9620(i) which expressly preserves the obligations of federal agencies "to comply with any requirement of [RCRA] (including corrective action requirements)." 42 U.S.C. § 9620(i) (West Supp.1992). This provision indicates that Congress did not intend that RCRA, or state laws authorized by the EPA to be enforced in lieu of RCRA, to be equivalent to laws concerning removal and remedial actions.

Despite the United States' concession concerning the incorrect application of § 9620(a)(4), it argues that the listing of Basin F on the national priority list removes any doubt that Colorado's enforcement of CHWMA at the Arsenal is precluded by § 9613(h). However, the national priority list is nothing more than "the list of priority releases for long-term remedial evaluation and response." 40 C.F.R. § 300.425(b) (1992). It "serves primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to war-

rant remedial action."[19] S.Rep. No. 848, 96th Cong., 2d Sess. 60 (1980). Placement on the national priority list simply has no bearing on a federal facility's obligation to comply with state hazardous waste laws which have been authorized by an EPA delegation of RCRA authority or a state's ability to enforce such laws.

VII.

The United States alternatively contends that CERCLA's provision, which grants the President authority to select the remedy and allow for state input through the ARAR's process, *see* 42 U.S.C. § 9621 (West Supp.1992), bars Colorado from enforcing state law independent of CERCLA. This is a curious argument in light of §§ 9614(a) and 9652(d) which expressly preserve state RCRA authority, and we find it to be without merit.

A.

While the United States does not dispute that Congress intended states to play a role in hazardous

[19] The legal significance of a particular site being placed on the national priority list is that "[o]nly those releases included on the [national priority list] shall be considered eligible for Fund-financed remedial action." 40 C.F.R. § 300.425(b)(1) (1992). Given that federal facilities, like the Arsenal, are not eligible for Super-fund-financed remedial action, 42 U.S.C. § 9611(e)(3) (West Supp.1992); 40 C.F.R. § 300.425(b)(3) (1992), placement of a federal facility on the national priority list serves only informational purposes. *See* 54 Fed.Reg. 10,520, 10,521 (1989) (EPA Listing Policy for Federal Facilities) ("placing Federal facility sites on the [national priority list] serves an important informational function and helps to set priorities and focus cleanup efforts on those Federal sites that present the most serious problems").

waste cleanup, the United States argues that the states' role when a CERCLA response action is underway is confined to CERCLA's ARAR's process.[20] Undoubtedly, CERCLA's ARAR's provision was intended to provide "a mechanism for state involvement in the selection and adoption of remedial actions which are federal in character." *Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1495 (10th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991). *See also United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1455 (6th Cir. 1991) (ARAR's provisions "reflect Congress' special concern that state interests in the health and welfare of their citizens be preserved, even in the face of a

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[20] CERCLA provides that "[t]he President shall select appropriate remedial actions determined to be necessary to be carried out under section 9604 . . . which are in accordance with this section, and to the extent practicable, the national contingency plan, and which provide for cost effective response." 42 U.S.C. § 9621(a) (West Supp.1992). Any hazardous substance remaining on site at the completion of the remedial action may be subject to a level or standard of control equivalent to any federal or state ARAR, including RCRA or state hazardous waste laws. *Id.* § 9621(d)(2)(A). The President has the authority to waive federal or state ARAR's in selecting a remedial action under certain circumstances. *See id.* § 9621(d)(4). When the President waives ARAR's with respect to federal facilities, the state may seek judicial review in federal court, limited to the administrative record, to determine whether the President's finding supporting the waiver is supported by substantial evidence. *Id.* § 9621(f)(3)(B)(i). If substantial evidence does not support the President's finding, a court may modify the remedial action to conform to the ARAR, *id.* § 9621(f)(3)(B)(ii); however, if the state fails to establish that the President's finding is not supported by substantial evidence, the state may pay the additional cost attributable to meeting the ARAR. *Id.* § 9621(f)(3)(B)(iii).

comprehensive federal environmental statute"). Nonetheless, nothing in CERCLA supports the contention that Congress intended the ARAR's provision to be the *exclusive* means of state involvement in hazardous waste cleanup.

Contrary to the United States' claim, Colorado is not invading the President's authority to select a CERCLA remedial action. Rather, Colorado is merely insuring that the Army comply with CHWMA which §§ 9614(a) and 9652(d) of CERCLA expressly recognize is applicable. Sections 9614(a) and 9652(d) were included within CERCLA when it was originally enacted in 1980. *See* Pub.L. No. 96-510, §§ 114(a), 302(d), 94 Stat. 2795, 2808 (1980). However, the ARAR's provision was not enacted until the 1986 amendments to CERCLA. *See* Pub.L. No. 99-499, § 121, 100 Stat. 1672 (1986). Certainly, Congress could not have intended the ARAR's provision to be the exclusive means of state involvement in hazardous waste cleanup as provided under §§ 9614(a) and 9652(d) when the ARAR's concept did not even come into being until six years after CERCLA was enacted.

Moreover, while the ARAR's provision requires the President to allow a state to participate in remedial planning and to review and comment on remedial plans, 42 U.S.C. § 9621(f)(1) (West Supp.1992), it only allows states to ensure compliance with state law at the completion of the remedial action. *See id.* §§ 9621(d)(2)(A), 9621(f)(2), 9621(f)(3). However, §§ 9614(a) and 9652(d) expressly contemplate the applicability of other federal and state hazardous waste laws regardless of whether a CERCLA response action is underway. Given that RCRA clearly applies during the closure period of a regulated facility, *see*

40 C.F.R. § 264.228 (1992); *id.* § 265.228, the ARAR's provision cannot be the exclusive means of state involvement in the cleanup of a site subject to both RCRA and CERCLA authority.

Contrary to the United States' claim, permitting state involvement in hazardous waste cleanup outside of CERCLA's ARAR's process, based on independent state authority, does not render the ARAR's process irrelevant. When a state does not have independent authority over the cleanup of a particular hazardous waste site, the ARAR's provision insures that states have a meaningful voice in cleanup. However, when, as here, a state has RCRA authority over a hazardous waste site, §§ 9614(a) and 9652(d) expressly preserve the state's exercise of such authority regardless of whether a CERCLA response action is underway.[21]

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[21] The United States relies on *Idarado Mining* and *Akzo Coatings* to support its claim that the ARAR's provision provides the exclusive means for state involvement in the cleanup of a hazardous waste site where a CERCLA response action is underway. In *Idarado Mining*, we held that § 9621(e)(2) which authorizes a state to "enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under" CERCLA in federal district court, did not authorize the district court to grant a state injunctive relief in the state's CERCLA response cost action. 916 F.2d at 1494. Unlike *Idarado Mining*, Colorado here is not seeking to broaden its § 9607 response action authority or § 9621(e)(2) ARAR enforcement authority under CERCLA.

In *Akzo Coatings*, the Sixth Circuit held that the terms of a consent decree between the EPA and a responsible party "set the parameters of relief available to the state" against the responsible party, and § 9621(f) precluded the state from pursuing alternative state remedies against the responsible party. 949 F.2d at 1454-55. Unlike the state in *Akzo Coatings*, Colorado is asserting its independent EPA-delegated RCRA authority rather than challenging the selection of a CERCLA remedy.

B.

The United States also argues that to allow Colorado to enforce the final amended compliance order would violate CERCLA's provision that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with [§ 9621]." 42 U.S.C. § 9621(e)(1) (West Supp.1992). While this provision arguably conflicts with §§ 9652(d) and 9614(a) when a state has been authorized to issue and enforce RCRA permits, the facts of this case do not require us to reconcile the potential conflict. The final amended compliance order does not require the Army to obtain a permit. Rather, it merely requires the Army to update its existing RCRA/CHWMA permit application to include all units currently containing Basin F hazardous waste, *see* Appellants' App. at 101, as required by both RCRA and CHWMA regulations applicable to interim status facilities.[22] *See* 40 C.F.R. § 270.72(a)(3); 6 Colo.Code Regs. 1007-3

[22] While Basin F lost its interim status on November 8, 1985, because the Army never requested a final Part B permit determination and never certified compliance with applicable groundwater monitoring requirements, *see* 42 U.S.C. § 6925(e)(2) (West Supp.1993), the Army is obligated to comply with RCRA and/or CHWMA regulations applicable to interim status facilities pending closure of Basin F pursuant to an approved closure plan. *See* 40 C.F.R. § 265.1(a) (1992) (standards for interim status facilities "define the acceptable management of hazardous waste during the period of interim status *and until certification of final closure*"); *id.* § 265.1(b) (interim status standards "apply . . . until either a permit is issued . . . *or until applicable . . . closure and post-closure responsibilities are fulfilled*). *See also* 6 Colo.Code Regs. 1007-3 § 265.1(a-b) (1993).

§ 100.11(d)(1) (1993). Thus, enforcement of the final amended compliance order would not violate § 9621 (e)(1).

C.

The United States also directs us to CERCLA's section governing "[s]ettlements," 42 U.S.C. § 9622 (West Supp.1992), and specifically its provision, within the "[s]pecial notice procedures" subsection, entitled "[i]nconsistent response action." *Id.* § 9622 (e)(6). This provision states that

> [w]hen either the President, or a potentially responsible party pursuant to an administrative order or consent decree under [CERCLA], has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

Id. While the relevance of § 9622(e)(6) to the present case is unclear, the United States relies on the EPA's interpretation of this provision in a policy statement concerning the listing of federal facilities on the national priority list. *See* 54 Fed.Reg. 10,520 (1989). In the course of discussing why it would not apply its policy of deferring placement of RCRA-subjected sites on the national priority list to federal facilities, the EPA recognized that when it undertakes a CERCLA response action at a site subject to state-delegated RCRA authority, a conflict may arise "from the overlap of the corrective action authorities of the two statutes." *Id.* at 10,522. The EPA takes the position

that § 9622(e)(6) gives the EPA final authority over the remedy when the conflicting views of the EPA and a RCRA-authorized state cannot be resolved in regard to a site where a RI/FS has been initiated. *Id.* at 10,523. In the EPA's view, § 9622(e)(6)'s authorization requirement applies, not only to a potentially responsible party's independent remedial action, but also to any action by a party which has been ordered by the state under its RCRA authority "as both types of action could be said to present a potential conflict with a CERCLA authorized action." *Id.* Thus, in the case of a conflict between the EPA and the state, § 9622(e)(6) authorizes the EPA to withhold authorization to a potentially responsible party from going forward with a RCRA corrective action ordered by the state. *Id.* Not surprisingly, the United States argues for deference to the EPA's interpretation of § 9622 (e)(6). *See Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1278 (10th Cir.1989).

The EPA's interpretation of § 9622(e)(6) has several problems, not the least of which is that it permits the EPA to preempt state law contrary to § 9614(a) and to modify a responsible party's obligations and liabilities under state RCRA programs contrary to § 9652(d). Section § 9622(e)(6) makes absolutely no mention of RCRA-authorized state actions, and it seems highly suspect that Congress intended this provision which is buried within a subsection entitled "notice provisions" in a section addressing settlements with private responsible parties to resolve conflicts between state-RCRA laws and CERCLA response actions. *See* H.R.Rep. No. 253(I), 99th Cong., 2d Sess. 100 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2882 (§ 9622 was "designed to encourage and facilitate negotiated private party cleanup").

Moreover, applying the EPA's interpretation of § 9622(e)(6) to federal facilities is contrary to the plain language of CERCLA's section specifically addressing federal facilities. 42 U.S.C. § 9620 (West Supp.1992). Congress expressly provided within the federal facilities section that "[n]othing in this section shall affect or impair the obligation of any department, agency or instrumentality of the United States to comply with any requirement of [RCRA] (including corrective action requirements)." *Id.* § 9620(i). while the EPA takes the position that its interpretation of § 9622(e)(6) is not inconsistent with § 9620(i) because RCRA requirements can be achieved through the ARAR's process pursuant to § 9621(d)(2), 54 Fed.Reg. at 10,526, the ARAR's process cannot be the exclusive means of a RCRA-authorized state's involvement in the cleanup of a RCRA-regulated site because otherwise a party's obligations under other federal and state hazardous waste laws would be modified during the closure period contrary to § 9652(d), and state law would be preempted contrary to § 9614(a). *See supra.* By the same reasoning, if the ARAR's process constituted a state's sole means of enforcing its RCRA program at a federal facility, the federal agency's RCRA obligations prior to completion of the CERCLA remedial action would be "affected or impaired" contrary to the plain language of § 9620(i). *See* H.R.Rep. No. 253(I), at 95, *reprinted in* 1986 U.S.C.C.A.N. at 2877 (federal facilities section "provides the public, states, and [the EPA] increased authority and a greater role in assuring the problems of hazardous substance releases are dealt with by expeditious and appropriate response actions").

Finally, § 9622(e)(6) is triggered by the initiation of a RI/FS. The federal facilities provision requires federal agencies to commence a RI/FS within six months after the facility is included on the national priority list, 42 U.S.C. § 9620(e)(1) (West Supp. 1992), and commence a remedial action within fifteen months of the study's completion, *id.* § 9620(e)(2), while at the same time providing that this section does not affect or impair the agency's RCRA corrective action requirements. *Id.* § 9620(i). Certainly, Congress could not have intended to require a RI/FS and RCRA compliance in one section while at the same time barring RCRA compliance when a RI/FS is initiated in another section. As summed up by one commentator, "if placement on the [national priority list], completion of a RI/FS, and initiation of remedial action pursuant to [§ 9620] does not impair RCRA obligations, mere initiation of the required investigation cannot have this effect." Joseph M. Willging, *Why the EPA's Current Policies on Potential CERCLA-RCRA Authority Conflicts May be Wrong,* 1 Fed. Facilities Envtl. J. 69, 82-83 (Spring 1990).

Because the EPA's interpretation of § 9622(e)(6) is "contrary to the plain and sensible meaning" of §§ 9622, 9614(a) and 9652(d), and, when applied to federal facilities, § 9620, we do not afford it any deference. *Hill,* 886 F.2d at 1278 (quotations omitted). In our view, § 9622(e)(6) does not bar a state from exercising its EPA-delegated RCRA authority at a federal facility where a RI/FS has been initiated.

VIII.

We REVERSE the district court's grant of summary judgment for Plaintiff-Appellee, the United

States. We REMAND to the district court with instructions to VACATE the order prohibiting Defendant-Appellants, Colorado and CDH, from taking any action to enforce the final amended compliance order and for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-1646

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF COLORADO AND THE COLORADO DEPARTMENT OF HEALTH, DEFENDANTS

[Filed Aug. 14, 1991]

MEMORANDUM OPINION AND ORDER

CARRIGAN, J.

Plaintiff, United States of America, commenced this action seeking declaratory and injunctive relief to prevent the defendants, State of Colorado and the Colorado Department of Health, from asserting state administrative authority to regulate hazardous waste management activities at Basin F, a hazardous waste disposal pond on the Rocky Mountain Arsenal (the Arsenal) northeast of Denver, Colorado. Defendants have moved for partial summary judgment. They seek an order declaring that The Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1982 & Supp. V 1987) does not preclude their asserting regulatory authority over the Basin F cleanup. Plaintiff has responded by opposing

the defendants' motion and itself seeking summary judgment based on the contention that the defendants' asserted authority to regulate would unlawfully challenge and interfere with the federal government's ongoing CERCLA response action.

The parties have exhaustively briefed the issues and presented oral argument. Both motions are ripe for decision. Jurisdiction exists pursuant to 28 U.S.C. § 1331.

In October 1984, the United States Army, acting pursuant to CERCLA, commenced a remedial investigation/feasibility study (RI/FS) at the Arsenal.[1] On November 2, 1984, Colorado was authorized by the EPA to administer its own hazardous waste management program under the Colorado Hazardous Waste Management Act (CHWMA), Colo. Rev. Stat. § 25-15-301 *et seq.* (1989) in lieu of the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* On August 21, 1987, the Arsenal, excluding Basin F, was listed on the National Priorities List (NPL). On February 17, 1989, the United States and Shell Oil Co. submitted, in this court's case No. 83-C-2379, a Federal Facility Agreement with respect to the Arsenal. That agreement was executed by the EPA, the Army, the Department of the Interior, the Agency for Toxic Substances and Disease Registry and Shell Oil Company.

In November 1984, the Army submitted to the Colorado Department of Health (CDH) a plan to close Basin F. Almost a year later, in October 1985, the CDH disapproved the Army's plan, prompting the

[1] Colorado contests when the Army commenced its RI/FS. (Defendant's motion for partial summary judgment, at 47 n. 1).

Army to submit to the CDH a second closure plan in December 1985. The CDH also found the Army's second plan deficient, and in May 1986, issued its own Basin F Proposed Partial Closure Plan. Colorado's final Modified Basin F Closure Plan was issued October 1, 1986. According to Colorado, after the Army made clear that it was not going to comply with that plan, the State amended its complaint in *Colorado v. United States Dept. of Army,* No. 86-C-2524 (D. Colo. November 30, 1987) (first amended complaint) to seek enforcement of the State plan.

On February 24, 1989, in *Colorado v. United States Dept. of Army,* this court responded to motions filed by the United States to contest Colorado's attempts at enforcing compliance with its closure plan, by stating:

> "In the First Amended Complaint, the plaintiff asserts claims against the Army for: (1) failure to close Basin F in compliance with the Basin F Closure Plan (First Claim); (2) failure to comply with Colorado's Ground Water Monitoring Regulations, a claim with three subclaims, and essentially a reassertion of three of the claims set forth in the plaintiff's initial complaint (Second Claim); and (3) failure to pay annual operating and waste volume fees, in violation of §§ 100.31(a) and (b) of State Fee Regulations, 6 CCR 1007-3, Part 100.
>
> * * *
>
> The Army has moved to dismiss the plaintiff's First Amended Complaint, asserting that the United States has not waived its sovereign immunity as to these claims under RCRA § 6001,

[42 U.S.C. § 6961]. Defendant Army's argument in part emphasizes that I presently have pending before me two actions directed at cleanup of the Arsenal as a whole. As stated above, these consolidated cases are *State of Colorado v. United States,* Civil Action No. 83-2386, and *United States v. Shell Oil Company,* Civil Action No. 83-C-2379. Both cases were filed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.* CERCLA was amended by the 1986 Superfund Amendments and Reauthorization Act ("SARA"), Pub.L.No. 99-499, 100 Stat. 1615.

Defendant Army does not dispute that RCRA § 6001 [42 U.S.C. § 6961], read in conjunction with RCRA § 7002 [42 U.S.C. 6972], contains a waiver of federal sovereign immunity. Rather, the Army asserts that sovereign immunity is not waived under those sections when there is an ongoing CERCLA cleanup action at the site that addresses hazardous waste requirements that are the same in substance as those sought to be enforced by the state under RCRA. In essence, the Army argues that CERCLA's enforcement and response provisions pre-empt and preclude a state RCRA enforcement action with respect to the cleanup of hazardous wastes at the Arsenal." *Colorado v. United States Dept. of Army,* 707 F. Supp. 1562, 1564-65 (D. Colo. 1989).

In that action, this court held that *because Basin F was not listed on the National Priorities List,* "RCRA enforcement by the State is not precluded by CERCLA. . . ." *Colorado v. United States Dept. of Army,* 707 F. Supp. at 1570.

On September 1, 1989, the state issued its Compliance Order seeking to force the Army: (1) to amend the final closure plan; (2) to close Basin F in a manner protective of human health and the environment pursuant to the requirements of the amended plan, the CHWMA; and (3) to comply with the other CHWMA requirements during the closure process.

Defendants assert that under Colorado's hazardous waste management program, all hazardous wastes must be treated, removed from the site, or disposed of on site in accordance with the state's approved closure plan. 6 Colo. Code Regs. § 265.113(a) (1989). To comply with the CHWMA, a site must, among other things, be closed in a manner that is protective of human health and the environment by controlling, minimizing, or eliminating releases of hazardous waste to ground or surface waters and to the air, and by removing or decontaminating contaminated soils. 6 Colo. Code Regs. §§ 265.111(b) and 265.112(b)(4).

As a preliminary matter, I note that in two of their counterclaims, the state defendants seek civil penalties against the federal government for violating the CHWMA. Defendants, however, have conceded that under *Mitzelfelt v. Department of Air Force*, 903 F.2d 1293 (10th Cir. 1990), those penalties cannot be assessed. In *Mitzelfelt* the Tenth Circuit held that RCRA § 6001, 42 U.S.C. § 6961, did not waive the sovereign immunity of the United States with respect to civil penalties. Further, the defendants have provided no evidence that Congress has enacted any clarifying language in any amendments to RCRA that would entitle it to assess civil penalties for violations of RCRA. Therefore, the plaintiff is entitled to summary judgment on this issue.

At the heart of the remaining dispute is the question whether the State of Colorado has authority to regulate the Basin F area at the Arsenal. In *Colorado v. United States Dept. of Army,* 707 F. Supp. 1562, I concluded that Colorado could, through enforcement of the CHWMA, regulate Basin F. Seventeen days after that ruling, however, on March 13, 1989, the EPA listed Basin F on the National Priority List (NPL) to become effective April 12, 1989. Thus, the dispositive question here is whether placing Basin F on the NPL divested this court of subject matter jurisdiction, after years of litigation, over Colorado's attempts to enforce the CHWMA at Basin F. The jurisdiction in question vested when *Colorado v. United States Dept. of Army* was filed on December 15, 1986.

Except as provided by 42 U.S.C. § 9613(a) and (h), United States District Courts have exclusive original jurisdiction over all controversies arising under CERCLA. 42 U.S.C. § 9613(b). Plaintiff asserts that § 9613(h) divests this court of subject matter jurisdiction. In pertinent part, that section states:

> "**Timing of review.** No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 104 [42 U.S.C. § 9604], or to review any order issued under section 106(a) [42 U.S.C. § 9606(a)], in any action except one of the following:
>
> * * *
>
> (4) An action under section 310 [42 U.S.C. § 9659] (relating to citizens suits) alleging that the removal or remedial action taken under section 104 [42 U.S.C. § 9604] or secured under section

> 106 [42 U.S.C. § 9606] was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site."

Although subsections (b) and (h) may appear to be in conflict, they are not. Subsection (b) provides that the district courts have exclusive jurisdiction over controversies arising under CERCLA. Pursuant to subsection (h), however, that jurisdiction does not attach until after a remedial action is completed.

Unquestionably, certain portions of CERCLA's legislative history indicate that Congress did not intend that § 9613(h) bar pre-completion judicial review in cases such as this. In deciding a question of statutory construction, however, I must begin with the words of the statute. *Demarest v. Manspeaker,* 111 S.Ct. 599, 602 (1991). Legislative history "can be a legitimate guide to a statutory purpose obscured by ambiguity, but '[i]n the absence of a clearly expressed legislative intention to the contrary, the language of the statute itself must ordinarily be regarded as conclusive.'" *Burlington N. R. Co. v. Oklahoma Tax Comm'n,* 481 U.S. 454, 461 (1987) (citations omitted).

Moreover, the United States Supreme Court has held that if a statute's terms are unambiguous, judicial inquiry into Congressional intent is inappropriate, unless exceptional circumstances dictate otherwise. *Id.; Demarest,* 111 S.Ct. at 603. Thus absent ambiguity in the statutory language, lower federal courts are bound to apply a literal interpretation to a statutes words even where it may be apparent that Congress must have intended something other than the narrow, exact meaning of the statutory language.

In another CERCLA case this court proceeded to a lengthy and expensive trial and thereafter granted the state injunctive relief based on the court's reading of the statute as implying authority to employ mandatory injunction procedures as the most efficacious means of providing the state the practical, enforceable participation in CERCLA cleanups this court felt Congress clearly had intended. *State of Colorado v. Idarado Mining Co.*, 707 F. Supp. 1227 (D. Colo. 1989). The Court of Appeals, however, reversed, applying a narrow, literal reading of the statute that denied the state injunctive relief. *State of Colorado v. Idarado Mining Co.*, 916 F.2d 1486 (10th Cir. 1990).

In *United States v. Durre,* 87-CR-386 (D. Colo. 1987), this court looked beyond literal statutory language to conclude that 28 U.S.C. § 1821(a)'s legislative history indicated that Congress did not intend prison inmates to be paid witness fees when subpoenaed and brought by writ to court to testify on behalf of fellow inmates. Similarly interpreting congressional intent, the Tenth Circuit affirmed in a split decision. *Demarest v. Manspeaker,* 884 F.2d 1343 (10th Cir. 1989). But the United States Supreme Court reversed, holding that resort to legislative history was improper because the statute was unambiguous. *Demarest,* 111 S.Ct. at 604. Ninety-one days after the Supreme Court announced its decision in *Demarest*, the President signed into law a bill plainly stating that incarcerated witnesses are not entitled to witness fees under § 1821, thus expressing the intent this court initially, but erroneously, had found to be implied. Thus was proved the adage that the best way to change an unreasonable law is to enforce it.

Section 9613(h) unambiguously indicates that this court lacks jurisdiction for pre-completion review of

the remedial action presently underway at Basin F now that it has been placed on the NPL. Therefore I conclude, as I must, that judicial inquiry into Congressional intent is prohibited. The statute's legislative history is irrelevant; if Congress intends a different result it is for Congress to amend the statute.

I note that this court has been divested of subject matter jurisdiction by the executive branch's action, through its agency, the EPA, (a party to this overall litigation) placing Basin F on the NPL. In other words, the executive, at the request of its litigant agency, has divested a federal court of its power to fully adjudicate a matter that has been in litigation before it for years. By thus granting the executive branch authority to place sites on the NPL, Congress has apparently delegated a portion of its authority to decide what cases a federal district court has the power to hear.

While it seems irrational in the context of separation of powers to allow the executive branch, after litigating a suit for years, suddenly to divest the court of jurisdiction by the administrative act of adding the site at issue to a list, that is the plain meaning of the statute's words. Unfortunately, CERCLA was enacted rather hastily near the end of a session and as the result of many last minute compromises. Thus some of the statute's provisions are not clear, and it contains many interstitial spaces left by Congress to be filled by judicial interpretation. The language here at issue, however, which results in revoking this court's subject matter jurisdiction, is clear.

Article III of the United States Constitution and the Judiciary Act of 1789 relegate to Congress authority to define the jurisdiction of this court. Thus a

court can be divested of statutory jurisdiction in a particular case by legislation even if not enacted until after the court has begun processing the case. *Bruner v. United States,* 343 U.S. 112, 115 (1952); *compare Phillips Petroleum Co. v. United States Environmental Protection Agency,* 803 F.2d 545, 551 (10th Cir. 1986) (Congress may *expand* a court's jurisdiction while a case is pending before it.)

Here, however, the question is somewhat more complicated than in *Bruner*; *i.e.,* whether Congress may be statute delegate to an executive branch administrator acting in the name of the President, the power to divest a federal district court of jurisdiction during litigation of a case over which that court otherwise has jurisdiction. Recent separation of powers cases have not bolstered, but rather have eroded, that historic buttress of judicial branch independence. See, *e.g., Mistretta v. United States,* 488 U.S. 361 (1989) (delegation by Congress to sentencing commission appointed by the President with the advice and consent of the Senate). Therefore there is no reason for this court to anticipate that the Supreme Court would disapprove the delegation by Congress to the President in this case.

Any attempt by Colorado to enforce the CHWMA would require this court to review the remedial actions selected under 42 U.S.C. § 9604 prior to their completion. Such a review is expressly prohibited by § 9613. Therefore, although the statute's legislative history indicates that Congress did not intend to foreclose such judicial review in all situations, I conclude that until the ongoing remedial action at Basin F is completed, CERCLA prohibits this court from reviewing it. In addition, Colorado is precluded from

enforcing Final Amended Compliance Order No. 89-05-2301.

Accordingly IT IS ORDERED that:

(1) Plaintiff's motion for summary judgment is granted;

(2) Defendants' motion for summary judgment is denied;

(3) Defendants' counterclaims are dismissed;

(4) The United States shall not be subjected to civil penalties provided in Colo. Rev. Stat. § 25-15-309 (1982), and the defendants shall not attempt to impose upon or collect from the United States any such civil penalties for actions arising out of the United States' activities at the Rocky Mountain Arsenal;

(5) Defendants shall not take any action to enforce their Final Amended Compliance Order No. 89-05-2301;

(6) The parties and their counsel shall meet and confer with the parties and their counsel from cases 83-C-2379, 83-C-2386 and 86-C-2524 within eleven days after this memorandum order is filed to determine what affect the order has on those cases. They are encouraged to use the good offices of the Special Master previously appointed in facilitating this conference. The parties shall report to this court in writing by August 30, 1991, stating the results of that meeting. The parties shall jointly submit a brief draft order disposing of all motions in those cases affected by this order in a manner consistent with this order; and

(7) The clerk of this court shall enter a final judgment consistent with this opinion.

Dated at Denver, Colorado August 14, 1991.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
United States District Judge

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

Magistrate Hilbert Schauer

Robert Foster, Esq.
Bradley Bridgewater, Esq.
U.S. Department of Justice
999 18th St. #501
Denver, CO 80202

James Ellman, Esq.
Nettie Corrigan, Esq.
First Assistant Attorney General
1560 Broadway #250
Denver, CO 80202

Linnea Brown, Esq.
1700 Lincoln #4100
Denver, CO 80203

Michael J. Norton
U.S. Attorney

/s/ ANITA MOORE
Deputy Clerk
Dated: August 14, 1991
Re: 89-C-1646

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 89-C-1646

UNITED STATES OF AMERICA

versus

STATE OF COLORADO AND
THE COLORADO DEPARTMENT OF HEALTH

[Filed Aug. 15, 1991]

JUDGMENT

Pursuant to and in accordance with the Order entered by the Honorable Jim R. Carrigan, on August 14, 1991.

It is ORDERED that Plaintiff, the United States of America's motion for summary judgment is granted; defendants, State of Colorado and the Colorado Department of Health's motion for summary judgment is denied; defendants' counterclaims are dismissed; and the United States shall not be subjected to civil penalties; defendants shall not attempt to impose upon or collect from the United States any civil penalties for actions arising out of the United States' activities at the Arsenal; defendants shall not take

any action to enforce their Final Amended Compliance Order No. 89-05-2301.

FOR THE COURT:

James R. Manspeaker, Chief

By:
/s/ Stephen P. Ehrlich
Chief Deputy Clerk

Approved:
/s/ Jim R. Carrigan
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1360

UNITED STATES OF AMERICA

versus

STATE OF COLORADO AND
THE COLORADO DEPARTMENT OF HEALTH

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Entered June 30, 1993

ORDER

Before McKAY, CHIEF JUDGE, and HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BLADOCK, BRORBY, EBEL and KELLY, Circuit Judges and O'CONNOR*, Senior District Judge.

This matter comes on from consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

---

* Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

ENTERED FOR THE COURT:

By:
/s/ Robert L. Hoecker
Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 91-1360

UNITED STATES OF AMERICA

versus

STATE OF COLORADO AND
THE COLORADO DEPARTMENT OF HEALTH

Entered July 9, 1993

ORDER

Before McKAY, CHIEF JUDGE, and HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BLADOCK, BRORBY, EBEL and KELLY, Circuit Judges and O'CONNOR*, Senior District Judge.

The order issued June 30, is reissued nunc pro tunc to read as follows:

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

---

* Honorable Earl E. O'Connor, Senior Judge, United States District Court for the District of Kansas, sitting by designation.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision, except insofar as the opinion of April 6, 1993, was amended June 30, 1993.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

ENTERED FOR THE COURT:

By:
/s/ Robert L. Hoecker
Clerk

APPENDIX F

DEPARTMENT OF HEALTH
STATE OF COLORADO

FINAL AMENDED COMPLIANCE ORDER No. 89-05-2301

IN THE MATTER OF UNITED STATES DEPARTMENT OF THE ARMY, ROCKY MOUNTAIN ARSENAL

This Final Amended Compliance Order ("Final Compliance Order") is being issued by the Colorado Department of Health through the Hazardous Materials and Waste Management Division ("CDH") to the United States Department of the Army ("Army") pursuant to CDH's authority under Section 25-15-308, C.R.S. (1982 & 1988 Supp.). This Final Amended Compliance Order No. 89-05-2301 replaces and supersedes Compliance Order No. 89-05-2301 issued on May 23, 1989, and the amendment dated May 30, 1989, and the Amended Compliance Order dated June 16, 1989.

GENERAL FINDINGS

1. The United States is the owner and the Army is the operator of the Rocky Mountain Arsenal ("Arsenal"). The Arsenal is located in Commerce City, Colorado, and occupies approximately 27 square miles north of Denver's Stapleton Airport. Beginning in 1942, the United States has used the Arsenal for the manufacture, assembly, detoxification, and disposal

of chemical warfare agents, chemical products, incendiary munitions, chemical munitions, and chemical agents, and other hazardous materials. From 1946 until about 1987, portions of the Arsenal were leased to private industry.

2. In 1980, the Army submitted to the Environmental Protection Agency ("EPA") a timely notification form and Part A of its Resource Conservation and Recovery Act ("RCRA") permit application for the Arsenal, and thereby achieved interim status for the Arsenal pursuant to RCRA Section 3005(e). The Army's Part A permit application included Basin F as a hazardous waste surface impoundment.

3. The Army constructed Basin F, a 92.7 acre lined basin, in 1956 for the disposal of contaminated liquid wastes generated in the course of Army and Shell Oil Company manufacturing and processing activities at the Arsenal. Basin F is located in section 26 of the Arsenal.

4. Basin F was used from 1957 until at least 1982 for the disposal of various hazardous and acutely hazardous liquid wastes, many of which are listed acutely hazardous wates, listed toxic hazardous wastes, and exhibit the characteristics of hazardous waste.

5. During 1988, the Army removed most of the liquid hazardous waste remaining in Basin F and is now storing that liquid in three tanks and at least one surface impoundment.

6. The Army continues to store soils containing acutely hazardous and toxic wastes in Basin F. Unexcavated contaminated soils are stored within Basin F, and excavated contaminated soils are stored in a waste pile which is situated within Basin F.

7. The Army submitted the original RCRA Part B permit application for the Arsenal to the EPA on or

about May 23, 1983, and submitted the original Basin F closure plan to EPA the following month.

8. On November 2, 1984, Colorado received authorization from EPA to enforce its state hazardous waste management laws in lieu of RCRA. 49 Fed. Reg. 41,036 (1984).

9. In November 1984, upon receipt by Colorado of authority from EPA to enforce state hazardous waste management laws in lieu of RCRA, the Army submitted its RCRA Part B permit application for the Arsenal and its Basin F RCRA closure plan to CDH.

10. After several iterations, CDH issued the final, approved Basin F Closure plan ("Basin F Closure Plan") on October 1, 1986, pursuant to 6 CCR 1007-3, Part 265, subpart G.

11. The Basin F Closure Plan became effective October 2, 1986, as a final order of CDH.

12. On October 14, 1987, the Army informed CDH of its opinion that Basin F was no longer appropriate for RCRA closure jurisdiction and that it was therefore withdrawing the Basin F Closure Plan and terminating interim status.

13. The Army has performed a partial cleanup of Basin F pursuant to what it has termed an "interim response action" purportedly in compliance with CERCLA.

14. On February 24, 1989, the Federal District Court of Colorado held that a CERCLA action does not take precedence over RCRA enforcement actions and that state RCRA-based actions are preserved despite an ongoing CERCLA action. *State of Colorado v. United States Dept. of the Army,* Civil Action No. 86-C-2524, at pp. 16, 18.

15. Basin F and all units containing Basin F hazardous waste are regulated by state hazardous waste

management laws and regulations pursuant to Section 25-15-303, C.R.S. (1982 & 1988 Supp.).

16. On May 1, 2, 10, 15, 17, 19, 22, and 23, 1989, inspectors for CDH conducted inspections pertaining to hazardous waste management units containing Basin F hazardous waste to evaluate compliance with the state hazardous waste management laws and implementing regulations.

17. On May 23, 1989, CDH issued Compliance Order No. 89-05-2301 to the Army. That Order was received by the Army via United States mail and/or by fax on May 24, 1989. That Order was also received by the Army by certified mail on May 24, 1989.

18. On May 30, 1989, CDH issued an Amended Compliance Order No. 89-05-2301. That Order was received by the Army via hand delivery on May 30, 1989.

19. On June 16, 1989, CDH issued Amended Compliance Order No. 89-05-2301. That Amended Compliance Order was received by the Department of Justice on June 16, 1989 and by the Army at the Arsenal on June 19, 1989 via hand delivery. The Amended Compliance Order invited the Army to an Informal Conference and invited the Army to provide CDH with information to contest any findings or explain any circumstances that tend to mitigate the stated violations.

20. On Friday, July 7, 1989, the Army submitted to CDH a draft "Basin F Interim Response Action Operation/Maintenance Manual and Inspection Procedures" ("O & M Plan"). The O & M Plan includes inspection schedules, a ground water monitoring plan, an air quality monitoring plan, and a contingency plan for Basin F. Such schedules and plans were

ordered in the Amended Compliance Order dated June 16, 1989.

21. The O & M Plan was not approved by CDH because significant portions failed to comply with RCRA/CHWMA regulations. The reasons therefore were provided to the Army on August 7, 1989.

22. An Informal Conference was requested by the Army. That conference was held on Monday, July 10, 1989 and was transcribed by a certified court reporter at the request of the Department of Justice.

23. On July 17, 1989 and August 21, 1989, the Army submitted to CDH documents regarding limited measurements and sampling from the leak detection systems of various Basin F hazardous waste management units and and [*sic*] on July 17, 1989, submitted a metallurgist's letter regarding Tank No. 2. The Army has submitted no further information regarding the status of the Basin F hazardous waste management units.

24. The Amended Compliance Order is revised in order to reflect information received from the Army since the issuance of the Amended Compliance Order.

25. On July 14, 1989, the State of Colorado received final authorization to operate its hazardous waste management program as revised in the September 30, 1988 application in lieu of the federal hazardous waste program.

26. The Amended Compliance Order is revised in order to include the regulations authorized for state implementation on July 14, 1989 by EPA.

FIRST AND SECOND VIOLATIONS
(Failure To Comply With The Basin F Closure Plan)

27. The General Findings set forth in paragraphs 1 through 26 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

28. The Basin F Closure Plan provides that closure activities occur generally as follows. All liquids were to be removed from Basin F by October 1987, stored on-site in tanks, and finally treated or disposed by October 1988. The Army was to propose a final excavation plan for the cleanup of Basin F contaminated soil by October 1987, and by April 1988 all contaminated Basin F solids were to be stored in an interim waste pile. By October 1988, the Army was to submit work plans for the treatment and disposal of Basin F solids, and by October 1991, all solids resulting from treatment of Basin F liquid and/or excavation of Basin F are to be finally treated or disposed. Concurrently with the removal and storage of hazardous waste, the Army is to identify the extent of waste migration beneath Basin F and continue ground water assessment monitoring. Finally, by October 1987, an interim ground water containment/treatment system was to be operated north of Basin F.

29. The Army has stated that its activities, with respect to Basin F hazardous waste, have not been performed pursuant to the Basin F Closure Plan. It has violated almost every provision of the Basin F Closure Plan. The Army has failed to comply with schedules, health and safety requirements, require-

ments for submission of work plans, and other requirements contained in the Basin F Closure Plan. Examples include the Army's failure to: install an interim groundwater treatment system; to conduct the required soil contamination assessment; to propose soil performance standards; to excavate to such soil performance standards and place all such excavated soils into a waste pile; to timely remove all the liquids from Basin F; to place all Basin F liquids in storage tanks; and to complete treatment and disposal of Basin F liquids.

Conclusions Of Law

30. Pursuant to 6 CCR 1007-3, Section 265.113(a) (10-87), all hazardous wastes must be treated, removed from the unit, or disposed of onsite in accordance with the approved closure plan. Pursuant to Section 265.113(b), closure activities must be completed in accordance with the approved closure plan.

31. The Army's failure to comply with the schedules, perform prescribed closure activities, submit the required work plans, and comply with all other requirements of the Basin F Closure Plan constitutes violations of 6 CCR 1007-3, Section 265.113(a) and (b) (10-87).

32. The Army's failure to comply with the schedules, perform prescribed closure activities, submit the required work plans, and comply with all other requirements of the Basin F Closure Plan constitutes violations of a final agency order, the Basin F Closure Plan.

THIRD VIOLATION
(Failure to Amend the Basin F Closure Plan)

33. The General Findings set forth in paragraphs 1 through 32 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

34. The Army claims unexpected events have occurred during closure activities. The Army has made major changes in operations and facility design which affect the Basin F Closure Plan and which were not authorized by the closure plan. For example, the Army characterizes the existence of millions of gallons in excess of the estimated quantity of Basin F liquids as an unexpected event. The Army did not have the tank capacity to contain all of the Basin F liquid hazardous waste and constructed surface impoundments for storage of the waste, thus altering the facility design and operation.

35. The Army changed the expected year of closure of Basin F. The Basin F Closure Plan requires closure of Basin F and final management of liquid and solid hazardous waste by October 1991. The Army's projections for a decision regarding the manner of final closure of Basin F and management of Basin F hazardous wastes is scheduled for 1993. The final closure of Basin F and management of Basin F hazardous waste probably will not be complete for years thereafter.

36. The Army failed to amend the Basin F Closure Plan even though there were claimed unexpected events during closure, changes in the operations and facility design, and changes in the expected year of closure.

Conclusions of Law

37. 6 CCR 1007-3, Section 265.112(c)(1) (9-88), requires that an owner or operator must amend a closure plan whenever: (i) changes in operating plans or facility design affect the closure plan; or (ii) there is a change in the expected year of closure; or (iii) in conducting partial or final closure activities, unexpected events require a modification off the closure plan. Section 265.112(c)(2) requires submittal of an amendment 60 days prior to a proposed change in facility design or operation and no later than 30 days after an unexpected event occurs during closure.

38. The Army's failure to amend the Basin F Closure Plan when there were changes in the operating plan and design, a change in the expected year of closure, and unexpected events constitutes violations of 6 CCR 1007-3, Section 265.112(c) (9-88).

FOURTH, FIFTH, AND SIXTH VIOLATIONS
(Storage of Hazardous Waste Without a Permit and Without Interim Status—Tanks)

39. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 38 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

40. During 1987, Shell, pursuant to an agreement with the Army, constructed three tanks, each with a capacity of approximately 1.33 million gallons, for the purpose of storing hazardous waste pumped from Basin F. The tanks are located northeast of Basin F. A surface impoundment with a capacity of

approximately forty thousand gallons was also constructed adjacent to the tanks and was used in the transfer of Basin F liquid hazardous waste to the tanks.

41. From May 1988 until about mid-September 1988, the Army pumped Basin F liquid hazardous waste from Basin F to trucks, from the trucks to a surface impoundment associated with the tanks, and then into the tanks. Approximately 1 million gallons of liquid were placed in each tank. According to a letter by Don Campbell, Deputy Program Manager, Rocky Mountain Arsenal, dated January 10, 1989, the three tanks were finally topped off with Basin F liquid hazardous waste on or about December 31, 1988.

42. The three tanks currently store a total of approximately 4 million gallons of Basin F liquid hazardous waste. According to the Army's representations during the May 1989 inspection, the Basin F liquid hazardous waste will remain stored in the tanks until completion of treatment and disposal of Basin F liquid hazardous waste, scheduled for 1993.

43. The Basin F Closure Plan required tanks for the interim storage of Basin F hazardous waste and modification to Part A of the Army's RCRA/CHWMA permit application to reflect the tanks.

44. The Army has never applied for nor received a permit or interim status from CDH or the USEPA for the storage of hazardous waste in the tanks.

Conclusions of Law

45. Section 25-15-308(1)(b), C.R.S. (1988 Supp.) states that no person shall "dispose of on-site, treat, or store any hazardous waste without having either

an interim federal status, a federal permit, or a permit granted by the Department pursuant to Section 25-15-303."

46. 6 CCR 1007-3, Section 260.10 defines storage as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste."

47. 6 CCR 1007-3, Section 100.10 states that "any person who treats, stores or disposes of any hazardous waste or wastes identified or listed in Part 261 must apply for a State-issued RCRA permit."

48. The storage of hazardous waste in the three tanks without a permit or interim status from the CDH constitutes three violations of Section 25-15-308(1)(b), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section 100.10.

SEVENTH AND EIGHTH VIOLATIONS

(Storage of Hazardous Waste Without Permit and Without Interim Status—Ponds A and B.)

49. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 48 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

50. During 1988, the Army constructed two surface impoundments referred to as Ponds A and B. Pond A has a capacity of approximately 8.5 million gallons, and Pond B has a capacity of approximately 5 million gallons.

51. Between mid-August and mid-September 1988, the Army pumped approximately 1 million gal-

lons of liquid hazardous waste from Basin F to Pond A.

52. Between mid-July and mid-August 1988, the Army pumped approximately 6.2 million gallons of liquid hazardous waste from Basin F to Pond B. (Hundreds of thousands of gallons of Basin F liquid hazardous waste was lost due to evaporation.)

53. Between mid-August and mid-September 1988, the Army pumped approximately 4.5 million gallons of liquid hazardous waste from Pond B into Pond A.

54. A portion of the Basin F liquid hazardous waste crystallized and remained in Pond B for at least a month following cessation of pumping from Pond B. This waste was ultimately transferred to Pond A.

55. During January 1989, the Army drained between 10,000 and 40,000 gallons of Basin F liquid hazardous waste from Tank No. 2, which had leaked hazardous waste. The drained liquid waste was transferred to Pond A.

56. According to the Weekly Leachate Removal Report, the Army has transferred close to 244,000 gallons of leachate from a 16-acre waste pile situated within Basin F to Pond A. The waste pile contains Basin F hazardous waste. The Army continues to transfer said leachate.

57. At least 5.5 million gallons of Basin F liquid hazardous waste is currently stored in Pond A. According to the Army's representations during the May 1989 inspection, this quantity or more of Basin F liquid hazardous waste will be stored in Pond A until completion of treatment and disposal of Basin F liquid hazardous waste, scheduled for 1993.

58. According to a letter from Don Campbell, dated January 11, 1989 and the O & M Plan, the Army may make future use of Pond B for storage of Basin F liquid hazardous waste during maintenance and repairs of the tanks and/or Pond A.

59. The Army has never applied for nor received a permit or interim status from CDH or the USEPA for the storage of hazardous waste in Ponds A and B.

Conclusions Of Law

60. Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) states that no person shall "dispose of on-site treat, or store any hazardous waste without having either an interim federal status, a federal permit, or a permit granted by the Department pursuant to Section 25-15-303."

61. 6 CCR 1007-3, Section 260.10 defines storage as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste."

62. 6 CCR 1007-3, Section 100.10 states that "any person who treats, stores or disposes of any hazardous waste or wastes identified or listed in Part 261 must apply for a State-issued RCRA permit."

63. The storage of hazardous waste in Ponds A and B without a permit or interim status from CDH constitutes two separate violations of Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section 100.10.

NINTH VIOLATION
(Storage of Hazardous Waste Without a Permit and Without Interim Status—Waste Pile)

64. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 63 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

65. During 1988, the Army constructed a 16-acre waste pile within Basin F. The capacity of the waste pile is approximately 600,000 cubic yards.

66. On or about December 13, 1988, the Army completed placement of approximately 500,000 cubic yards of Basin F soil and debris containing hazardous waste into the waste pile.

67. On or about January 27, 1989, the Army removed soil that was contaminated as a result of a spill from one of the tanks and placed that soil in the waste pile.

68. According to Don Campbell's letter of April 5, 1989, installation of the HDPE liner on the waste pile was completed on or about March 22, 1989, the final clay cap was completed on or about March 23, 1989, and the top soil activity was completed on or about April 5, 1989.

69. According to the Army's representations during the May 1989 inspection, Basin F solid hazardous waste will remain stored in the waste pile until beyond issuance of the CERCLA Record of Decision. According to the Army's June 1, 1989, Primavera Project Planner, the Record of Decision will not be available until August 1993.

70. The Basin F Closure Plan required a waste

pile for the interim storage of Basin F hazardous waste and modification to Part A of the Army's RCRA/CHWMA permit application to reflect the waste pile.

71. The Army has never applied for nor received a permit or interim status from CDH or the USEPA for the storage of hazardous waste in the waste pile.

Conclusions Of Law

72. Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) states that no person shall "dispose of on-site, treat, or store any hazardous waste without having either an interim federal status, a federal permit, or a permit granted by the Department pursuant to Section 25-15-303."

73. 6 CCR 1007-3, Section 260.10 defines storage as "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of hazardous waste."

74. 6 CCR 1007-3, Section 100.10 states that "any person who treats, stores or disposes of any hazardous waste or wastes identified or listed in Part 261 must apply for a State-issued RCRA permit."

75. The storage of hazardous waste in the waste pile without a permit and without interim status from CDH constitutes a violation of Section 25-15-308 (1) (b), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section 100.10 (1-88).

TENTH, ELEVENTH, AND TWELFTH VIOLATIONS
(Failure To Pay Fees)

76. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through

75 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

77. Pursuant to 6 CCR 1007-3, Sections 100.31 and 100.34 (9-85) CDH billed the Army for 1986 annual operating and waste volume fees in the total amount of $11,000. The Army failed and refused to pay any portion of the 1986 annual operating and waste volume fees.

78. Pursuant to 6 CCR 1007-3, Section 100.31 (1-88), CDH billed the Army for 1987 annual fees in the total amount of $5,060.00. The Army failed and refused to pay any portion of the 1987 annual fees.

79. Pursuant to 6 CCR 1007-3, Section 100.31 (1-88), CDH billed the Army for 1988 annual fees in the total amount of $5,060.00. The Army failed and refused to pay any portion of the 1988 annual fees.

80. The Arsenal was used to treat, store and/or dispose of hazardous waste in 1986, 1987, 1988, and is currently so used. Final closure of the Arsenal has not been accomplished or certified.

Conclusions Of Law

81. Pursuant to 6 CCR 1007-3, Sections 100.31 and 100.34 (9-85), all facilities that were operated for the treatment, storage or disposal of hazardous waste were subject to the annual operating and waste volume fees.

82. Pursuant to 6 CCR 1007-3, Section 100.31 (1-88), all facilities that are operated for the treatment, storage or disposal of hazardous waste are subject to the annual fee until final closure is certified.

83. The Army's failure to pay the annual operating and waste volume fees for 1986 constitutes a violation of 6 CCR 1007-3, Sections 100.31 and 100.34 (9-85).

84. The Army's failure to pay the annual fees for the years 1987 and 1988 constitutes two violations of 6 CCR 1007-3, Section 100.31 (9-88).

THIRTEENTH, FOURTEENTH, AND FIFTEENTH VIOLATIONS
(Failure to Properly Respond to a Release from Tank No. 2)

85. The General Findings, Findings of Fact and Conclusions of Law set forth in paragraphs 1 through 84 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

86. According to Don Campbell's letter dated January 10, 1989, Basin F liquid storage Tank No. 2 began leaking Basin F liquid hazardous waste on January 3, 1989. The letter stated that it was believed that the internal liner had failed in part and that Basin F liquid had seeped into the annulus between the liner and the tank wall. Basin F liquid hazardous waste remains in contact with the tank wall.

87. On March 9, 1989, Shell proposed that the Army leave the Basin F liquid in Tank No. 2 and that Shell initiate a program of ultrasonic monitoring of the thickness of the tank wall. The monitoring program examined eight vertical 10 inch strips around the entire tank or approximately 3.5 percent of the area of Tank No. 2.

88. In a letter dated April 17, 1989, from the

United States Department of Justice to the Colorado Department of Law, the Army stated that the leaked Basin F liquid did not go beyond the secondary containment system. The letter indicated that the Army has not removed the liquid from the tank and that pending review of the ultrasonic testing data and related information, it would defer a decision on whether draining of the affected tank is warranted.

89. At a meeting held on May 2, 1989, Shell presented an analysis of the ultrasonic testing which did not disclose the cause of the leak.

90. At the May 2, 1989, meeting, Shell stated that it could not determine the decrease in the life of subject tank until further ultrasonic testing scheduled for September 1989. The tank life may be shortened due to corrosion of the steel resulting from contact of the tank wall with liquid Basin F hazardous waste.

91. By letter dated June 12, 1989, Mr. John Moscato, of the U.S. Department of Justice, informed Ms. Jacqueline Beradini, of the Colorado Department of Law, that the Army would continue to store Basin F liquid in Tank No. 2.

92. The Department of Health was not provided with a report supporting a certification that Tank No. 2 is fit for service.

Conclusions Of Law

93. Pursuant to 6 CCR 1007-3, Section 264.196 (9-88), a tank system or secondary containment system from which there has been a leak or spill must be removed from service immediately.

94. Pursuant to 6 CCR 1007-3, Section 264.196 (a) (9-88), an owner or operator must inspect the tank

system to determine the cause of the release.

95. Because the tanks have secondary containment, the pertinent provisions of 6 CCR 1007-3, Section 264.196 (e) are (1), (2), and (3). These provide:

> (1) Unless the owner/operator satisfies the requirements of paragraphs (e) (2) through (4) of this section, the tank system must be closed in accordance with Section 264.197.
>
> (2) If the cause of the release was a spill that has not damaged the integrity of the system, the owner/operator may return the system to service as soon as the released waste is removed and repairs, if necessary, are made.
>
> (3) If the cause of the release was a leak from the primary tank system into the secondary containment system, the system must be repaired prior to returning the tank system to service.

96. The Army's failure to remove the tank from service immediately after the release or to develop a plan to remove from service as soon as a safe alternative became available constitutes a violation of 6 CCR 1007-3, Section 264.196.

97. The Army's failure to determine the cause of the tank release constitutes a violation of 6 CCR 1007-3, Section 264.196 (a).

98. The Army's failure to repair the cause of the release of hazardous waste from Tank No. 2 into the secondary containment system prior to returning the tank to service constitutes a violation of 6 CCR 1007-3, Section 264.196 (e) (9-88).

SIXTEENTH VIOLATION

(Denial of Access to Records During An Inspection).

99. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 98 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

100. On April 24, 1989, CDH notified the Army by letter that CDH would inspect Basin F and all units containing Basin F hazardous waste commencing on May 1, 1989. CDH further informed the Army that the inspection would include a review of documents required to be maintained on-site pursuant to 6 CCR 1007-3.

101. On the morning of May 1, 1989, CDH orally provided the Army with a preliminary list of documents necessary to continue the inspection. The list included documents required to be maintained at the facility by the Colorado Hazardous Waste Regulations as well as other documents which would evidence compliance with the regulations. Counsel for the Army agreed to provide documents in the afternoon of May 1, 1989.

102. In the afternoon of May 1, 1989, the Army provided Colorado with some of the documents agreed to be provided.

103. In the afternoon of May 1, 1989, counsel for CDH provided the Army with a preliminary written list of documents necessary to continue the inspection. The list included documents required to be maintained at the facility by the Colorado Hazardous Waste Regulations. Counsel for the Army agreed to provide these documents by noon on May 2, 1989.

104. On May 2, 1989, counsel for the Army phoned counsel for CDH, stated that the documents would not be available on May 2, 1989 and requested a 30-day extension of time to provide the documents. Said extension was denied. During a follow-up conversation, counsel for the Army advised counsel for CDH that the contractor's documents were in a truck located on the Arsenal, destined to be relocated in a library (RIC) also situated on the Arsenal. Counsel for CDH requested that a restricted number of documents (including certain documents which were not on the truck) be provided the following day. Counsel for the Army refused to do so and stated that documents would become available as they were microfilmed and reviewed by counsel—the first documents to become available on May 10, 1989.

105. On May 3, 1989, CDH returned to the Arsenal and again requested access to the documents. Counsel for the Army informed CDH that no more documents would be made available until May 10, 1989 and thereafter. A letter dated May 3, 1989, from counsel for the Army to counsel for CDH confirmed this information.

106. On May 10 and 15, 1989, a portion of the documents requested by CDH were made available for review.

107. On May 15, 1989, counsel for the Army informed CDH that many of the requested documents would not be available until the first week of June, if at all.

108. On June 7, 1989, Mr. David Anderson, counsel for the Army, notified Ms. Nettie Rosenthal, counsel for CDH, that supplemental documents were avail-

able for review and that others would later become available.

109. After CDH attempted to make arrangements to review the supplemental documents, Mr. Anderson informed Ms. Rosenthal on June 12, 1989, that the documents would not be available for review until June 19, 1989—fully a month and a half after commencement of inspection.

110. On June 20, 1989, Colorado received copies of some of the documents requested during the inspection and copies of the supplemental documents.

111. Among the documents initially requested on May 1, 1989, were all operating logs for Basin F from November 1980 until the present.

112. On May 1, 1989, Mr. Anderson assured representatives of CDH that these operating logs could be provided.

113. On May 15, 1989, Mr. Anderson informed representatives of CDH that Basin F operating logs from November 1980 through commencement of the Army's interim action were located in Washington DC and would not be available for review.

114. Among other records, the Department of Health has not yet been provided with the Basin F operating logs from November 1980 through commencement of the Army's Basin F interim action.

Conclusions Of Law

115. Section 25-15-301 (3), C.R.S. (1988 Supp.) provides:

> "The department, by its duly authorized representatives, shall have the powers to enter and inspect any property, premises or place in which hazardous waste is reasonably believed to be

located for the purpose of determining the compliance or noncompliance with any provisions of this part 3, any order or permit, or term or condition thereof, issued pursuant to this part 3 . . . "

116. 6 CCR 1007-3, Sections 264.74 and 265.74 (5-87) require:

"All records, including plans, required under this part must be furnished upon request, and made available at all reasonable times for inspection, by any officer, employee, or representative of CDH who is duly designated by the Director."

117. 6 CCR 1007-3, Parts 264 and 265 require that certain documents be maintained at the facility. These documents include, but are not limited to: waste analysis plan [Sections 264.13 (b) and 265.13 (b)]; inspection schedule and plan [Sections 264.15 (d) and 265.15 (d)]; inspection logs and summaries [Sections 2674.15 (d) and 265.15 (d)]; records of job titles, job descriptions, employees and employee training [Sections 264.16 (d) and 265.16 (d)]; contingency plan [Sections 264.53 and 265.53]; operating records [Sections 264.73 and 265.73]; and unapproved closure plans [Section 265.112].

118. The Army's failure, on May 1 through May 23, 1989, to provide a waste analysis plan, all inspection shedules and plans, all inspection logs and summaries, all records of job titles, job descriptions, employees, and employee training, all operating records, and all unapproved closure plans constitutes violations of Section 25-15-301 (3), C.R.S. (1988 Supp.) and 6 CCR 1007-3, Section, [sic] 264.74 and 265.74 (5-87).

SEVENTEENTH THROUGH TWENTY-EIGHTH VIOLATIONS
(Failure to Perform Adequate Inspections of Basin F Tanks).

119. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 118 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

120. Basin F liquid hazardous waste was first placed in the tanks on or about May 26, 1988.

121. Each of the three Basin F hazardous waste storage tanks is equipped with two leak detection systems. These consist of a leak detection system for the double steel bottom and a leak detection system for the internal liner. There are eight nozzles around the bottom of each tank for detection of any leakage through the internal liner.

122. According to Mr. Edwin Berry, the Army did not check the leak detection valves of any of the tanks until after the leak from Tank No. 2 was discovered. This inspection occurred on or about January 3, 1989.

123. On May 17, 1989, Mr. Berry indicated that the leak detection valves of Tank Nos. 1 and 3 had not been checked since the inspection which had occurred on or about January 3, 1989.

124. The Basin F Monthly Summary Tank Farm Management report, the only document submitted by the Army regarding inspection of leak detection valves, indicates that regular inspection of the leak detection valves on Tank Nos. 1 and 3 did not commence until July 1989.

125. The Army did not provide documents evi-

dencing any type of inspection of the tanks for the period from when the Army first placed liquid Basin F hazardous waste into the tanks until June 13, 1989.

126. The Army did not provide documents evidencing daily inspections of aboveground portions of the tanks for dates prior to May 1, 1989.

127. Many of the documents provided as inspection documents did not indicate inspections to detect corrosion or releases, data from monitoring and leak detection equipment, and inspections of the area immediately surrounding the externally accessible portion of the tank system to detect erosion or signs of releases of hazardous waste.

128. None of the inspection logs contain evidence of inspection of the leak detection ports on a regular basis.

129. The inspection logs from June 13, 1988 until September 27, 1988, provide only tank level readings.

130. Each of the three Basin F hazardous waste storage tanks is equipped with two cathodic protection systems.

131. The Army did not provide documents of evidencing passing inspections of the cathodic protection systems for inspections required six months after initial installation and annually thereafter.

132. The Army did not provide documents evidencing passing inspections of all sources of impressed current on a bimonthly basis for the time period during which the tanks contain Basin F hazardous waste.

133. By letter dated May 31, 1989, John Moscato, counsel for the Army, informed Jacqueline Berardini,

counsel for CDH, that: on May 19, 1989 a small drip was discovered on one of the valves of Tank No. 3; that on May 25, 1989, liquid samples were taken from all valves on Tank Nos. 1 and 3; and analyses of the samples revealed the presence of Basin F-related compounds.

134. According to the Basin F Tank Farm Progress Report to PMRMA, dated June 26, 1989 and the only Basin F Monthly Summary Tank Farm Management report, certain valves on Tank No. 3 had any measurable fluid. These valves detect the presence of liquids in between the internal liners and the tank walls.

Conclusions Of Law

135. 6 CCR 1007-3, Section 264.15 (a) provides:

> (a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to—(1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

136. 6 CCR 1007-3, Section 264.15 (b) provides, in part:

> (b) (1) The owner or operator must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or

responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of possible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction of any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.

137. 6 CCR 1007-3 Section 264.15 (d) provides:

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector, a notation of the observations made, and the date and nature of any repairs or other remedial actions.

138. 6 CCR-3 Section 294.195 (b) provides, in part:

(b) The owner and operator must inspect at least once each operating day:

(1) Aboveground portions of the tank system, if any, to detect corrosion or releases of waste;

(2) Data gathered from monitoring and leak

detection equipment (e.g., pressure or temperature gauges, monitoring wells) to ensure that the tank system is being operated according to its design; and

(3) The construction materials and the area immediately surrounding the externally accessible portion of the tank system, including the secondary containment system (e.g., dikes) to detect erosion or signs of releases of hazardous waste (e.g., wet spots, dead vegetation).

139. 6 CCR 1007-3 Section 294.195 (c) provides, in part:

(c) The owner or operator must inspect cathodic protection systems, if present, according to, at a minimum, the following schedule to ensure that they are functioning properly:

(1) The proper operation of the cathodic protection system must be confirmed within six months after initial installation and annually thereafter, and

(2) All sources of impressed current must be inspected and/or tested as appropriate, at least bimonthly (i.e., every other month).

140. The Army performed inadequate routine inspections of the tanks. The Army's failure to inspect for all items required by 6 CCR 1007-3, Sections 264.15 (a) & (b) and 264.195 (b) constitute violations of 6 CCR 1007-3, Sections 264.15 and 264.195 for each tank.

141. Failure by the Army to inspect the proper operation of the cathodic protection systems as required and to inspect the source of impressed current on a bimonthly basis for each of the three Basin F

hazardous waste storage tanks constitutes a separate violation of 6 CCR 1007.3, Section 264.195 (c) for each tank.

142. The Army's failure to develop written inspection schedules from the time the tanks first received hazardous waste constitutes a separate violation of 6 CCR 1007-3, Section 264.15 (b) for each tank.

143. The Army's failure to keep inspection logs from the time the tanks received hazardous waste constitutes a separate violation of 6 CCR 1007-3, Section 264.15 (d) for each tank.

TWENTY-NINTH THROUGH THIRTY-FIRST VIOLATIONS
(Failure to Perform Adequate Inspections of the Basin F Waste Pile)

144. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 143 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

145. Hazardous waste was first placed on the double lined waste pile on or about October 11, 1988.

146. On May 1, 1989, CDH inspectors requested copies of all written schedules and logs for all inspections conducted to identify malfunctions and deteriorations of the Basin F waste pile.

147. On May 15, 1989, Robert Pitts, of Acumenics, a company that provides support to the Department of Justice, stated that all inspections of the waste pile prior to April 29, 1989, would be documented in the Basin F daily Health and Safety logs or in the Basin

F Quality Assurance/Quality Control ("QA/QC") logs.

148. The inspectors determined that the Basin F daily Health and Safety logs and the Basin F QA/QC logs did not contain records of weekly inspections of the waste pile to detect evidence of the following: deterioration, malfunctions or improper operation of run-on and run-off control systems; the presence of liquid in the leak detection system; proper functioning of wind dispersal control systems; presence of liquid in the leachate collection; and proper functioning of the leachate collection and removal systems. Such weekly inspections did not commence until May 8, 1989.

Conclusions Of Law

149. 6 CCR 1007-3, Section 264.15 (a) provides:

> (a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to—(1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

150. 6 CCR 1007-3 Section 264.15 (b) provides, in part:

> (b) (1) The owner or operator must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or

responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of possible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction of any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.

151. 6 CCR 1007-3 Section 264.15 (d) provides:

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector, a notation of the observations made, and the date and nature of any repairs or other remedial actions.

152. 6 CCR 1007-3 Section 264.254 (b) (9-85) provides:

(b) While a waste pile is in operation, it must be inspected weekly and after storms to detect evidence of the following:

(1) Deterioration, malfunctions, or improper operation of run-on and run-off control systems;

(2) The presence of liquids in leak detection systems, where installed to comply with section 264.252;

(3) Proper functioning of wind dispersal control systems, where present; and

(4) The presence of leachate in and proper functioning of leachate collection and removal systems, where present.

153. The Army performed inadequate inspections of the waste pile. The Army's failure to perform weekly inspections of the waste pile that included the items required by 6 CCR 1007-3, Sections 264.15 (a), 264.15 (b), and 264.254 (b) constitutes violations of the cited sections.

154. Prior to May 8, 1989 the Army failed to develop a written schedule for inspection of the waste pile. Such failure constitutes a violation of 6 CCR 1007-3, Section 264.15 (b).

155. The Army's failure to keep inspection logs from the time the waste pile received hazardous waste constitutes a violation of 6 CCR 1007-3, Section 264.15 (d).

THIRTY-SECOND THROUGH THIRTY-FOURTH VIOLATIONS
(Failure to Perform Inspections of Basin F)

156. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 155 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

157. Large quantities of soil contaminated with Basin F hazardous waste remain stored in Basin F.

158. Basin F has never been closed pursuant to CHWMA and therefore, remains an active storage facility.

159. During December 1988 through spring 1989, Basin F was covered with a layer of clay soil and a layer of top soil and was seeded.

160. The Army did not provide inspection plans, schedules or logs pertaining to Basin F during the time period that Basin F contained liquid hazardous waste.

161. The Army did not provide inspection plans, schedules or logs pertaining to Basin F for the time period since Basin F was covered until May 12, 1989.

Conclusions Of Law

162. 6 CCR 1007-3, Section 265.15 (a) provides:

> (a) The owner or operator must inspect his facility for malfunctions and deterioration, operator errors, and discharges which may be causing—or may lead to— (1) release of hazardous waste constituents to the environment or (2) a threat to human health. The owner or operator must conduct these inspections often enough to identify problems in time to correct them before they harm human health or the environment.

163. 6 CCR 1007-3 Section 2675.15 (b) provides, in part:

> (b) (1) The owner or operator must develop and follow a written schedule for inspecting monitoring equipment, safety and emergency equip-

ment, security devices, and operating and structural equipment (such as dikes and sump pumps) that are important to preventing, detecting, or responding to environmental or human health hazards.

(2) He must keep this schedule at the facility.

(3) The schedule must identify the types of problems (e.g., malfunctions or deterioration) which are to be looked for during the inspection (e.g., inoperative sump pump, leaking fitting, eroding dike, etc.).

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of posssible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction of any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use.

164. 6 CCR 1007-3 Section 265.15 (d) provides:

(d) The owner or operator must record inspections in an inspection log or summary. He must keep these records for at least three years from the date of inspection. At a minimum, these records must include the date and time of the inspection, the name of the inspector,a notation of the observations made, and the date and nature of any repairs or other remedial actions.

165. The Army's failure to provide inspection plans, schedules or logs involving Basin F is interpreted to mean that such plans, schedules, or logs do not exist and that inspections did not occur.

166. The Army's failure to inspect Basin F prior to removal of the liquid hazardous waste from the basin constitutes a violation of 6 CCR 1007-3, Section 265.15 (a).

167. The Army's failure to inspect Basin F since the installation of the cover and prior to May 12, 1988 constitutes a violation of 6 CCR 1007-3, Section 265.15 (a).

168. The Army's failure to develop an inspection schedule which covers Basin F prior to removal of the liquid hazardous waste from the basin constitutes a violation of 6 CCR 1007-3, Section 265.15 (b).

169. The Army's failure to develop an inspection schedule which covers Basin F since the installation of the cover and prior to May 12, 1989 constitutes a violation of 6 CCR 1007-3, Section 265.15 (b).

170. The Army's failure to keep inspection logs regarding Basin F prior to removal of the liquid hazardous waste from the basin constitutes a violation of 6 CCR 1007-3, Section 265.15 (d).

171. The Army's failure to keep inspection logs regarding Basin F since the installation of the cover and prior to May 12, 1989 constitutes a violation of 6 CCR 1007-3, Section 265.15 (d).

THIRTY-FIFTH THROUGH THIRTY-SEVENTH VIOLATIONS
(Failure to Notify of Leaks—
Pond A, Pond B, and the Waste Pile)

172. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 171 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

173. On May 1, 17, and 22, 1989, CDH inspectors were told by Mr. Edwin Berry and on May 22 and 25 by Mr. Don Campbell, Deputy Program Manager of the Rocky Mountain Arsenal, that liquids had been discovered in the leak detection systems of Pond A, Pond B, and the waste pile since at least October 1988.

174. According to Messrs. Berry and Campbell during the May 1989 inspection, liquids from at least one leak detection system were pumped into Pond A since October 1988.

175. According to a Contaminated Liquid Removal Daily Report dated August 18, 1988, approximately 350 gallons of liquid was pumped from the Pond A sump and the liquid appeared to be similar to Basin F liquid.

176. According to a Contaminated Liquid Removal Daily Report dated August 18, 1988, approximately 1000 gallons of liquid was pumped from the Pond B sump and the liquid initially appeared to be similar to Basin F liquid.

177. According to Messrs. Berry and Campbell, prior to May 24, 1989, no analyses were performed on liquids found in the leak detection systems of Pond A, Pond B, and the waste pile nor on the liquids transferred from the leak detection systems to Pond A. Prior to May 24, 1989, both Messrs. Berry and Campbell, indicated their belief that the liquids in each of the leak detection systems for Pond A, Pond B, and the waste pile were condensate because the men claimed that the liquid was almost clear and did not smell like Basin F liquids.

178. On May 23, 1989, Army contractors

(EBASCO) took samples of liquid from the leak detection systems of Pond A, Pond B, and the waste pile at the request of CDH and in the presence of representatives of CDH. Duplicates and/or splits of the samples were provided to the Army in the Army's bottles.

179. While the samples were being taken, CDH representatives noted that the samples taken from the Pond A leak detection system were dark black/brown in color and were more viscous than water. Jed Lowrey of EBASCO, who was taking the samples, stated that the samples smelled like Basin F.

180. While samples were being taken, CDH representatives noted that the samples taken from the Pond B leak detection system had a brown taint and smelled like Basin F hazardous waste.

181. While samples were being taken, CDH representatives noted that the samples taken from the waste pile cell no. 3 leak detection system and the cell no. 3 leachate collection system had a brown taint and smelled of Basin F hazardous waste.

182. On May 25, 1989, Mr. Campbell called a meeting to discuss the Army's preliminary results of analyses of samples collected on May 23, 1989 from the leak detection systems of Pond A, Pond B, and the waste pile.

183. The May 25, 1989 meeting included Mr. Campbell; Messrs. David Anderson and John Moscato of the U.S. Department of Justice; Messrs. Connally Mears, William Clemens and Ms. Linda Grimes of the U.S. EPA; Ms. Vicky Peters of the Colorado Department of Law; and Mr. Jeff Edson of CDH.

184. According to Mr. Campbell, the Army's qualitative analytical results indicated the presence of Basin F constituents in each of the samples from the

leak detection systems. The primary constituents identified were sulfur compounds and dimethyl methylphosphonate.

185. The CDH lab confirmed the results found by the Army and preliminarily identified the presence of DBCP.

186. Mr. Campbell also stated that the liquids in the leak detection systems were pumped into Pond A on May 24, 1989.

187. According to Mr. Campbell, no measurements were made of the volumes of liquids removed from each leak detection sump although CDH requested those measurements prior to the pumping. Mr. Campbell further stated that elevations of liquids in the sumps were measured but that these measurements had not been converted to volume measurements.

188. According to a Request for and Results of Tests dated July 5, 1989, samples taken from the Pond A sump on or about June 29, 1989 contain 57.3 mg/l of DMMP and 53.7 mg/l of P-CPMSO.

189. According to Table 2 of Basin F Ponds A and B Progress Report to PMRMA dated June 26, 1989, the liquids stored in Pond A contain 11.6 mg/l of DMMP and 39.2 mg/l of p-CPM sulfone.

190. According to the Basin F Ponds A and B Progress Report to PMRMA dated June 26, 1989, the contractor did not attempt to pump the Pond A sump until May 26, 1989 but could not do so, in part, because the high concentration of salts in the liquid caused crystallization to occur in the pump.

191. According to the Weekly Leachate Removal Report, for the dates April 27, 1989 through June 24, 1989, thousands of gallons of liquid were removed

from the waste pile leak detection and leachate collection systems on a daily basis.

192. Given the fact that liquid containing Basin F hazardous waste constituents was found in the leak detection system of Pond A, CDH must conclude that Basin F hazardous waste is leaking through the primary Pond A liner into the leak detection system.

193. Given the fact that liquid containing Basin F hazardous waste constituents was found in the leak detection system of Pond B, CDH must conclude that Basin F hazardous waste leaked through the Pond B primary liner into the leak detection system during the period that Basin F hazardous waste was present in Pond B.

194. Given the fact that liquid containing Basin F hazardous waste constituents was found in cell no. 3 of the leak detection system of the waste pile, CDH must conclude that Basin F hazardous waste is leaking through the waste pile primary liner into the leak detection system.

195. The Army did not provide written notification to CDH within seven days of detecting liquids in the leak detection systems of Pond A, Pond B, and the waste pile.

Conclusions Of Law

196. Regarding surface impoundments, 6 CCR 1007-3, Section 264.222 (b) (1) (9-85) provides:

> (b) If liquid leaks into the leak detection system, the owner or operator must:
>
> (1) Notify the Department of the leak in writing within seven days after detecting the leak; ...

197. Regarding waste piles, 6 CCR 1007-3, Section 264.252 (b) (1) (9-85) provides:

> (b) If the liquid leaks into the leak detection system, the owner or operator must:
>
> (1) Notify the Department of the leak in writing within seven days after detecting the leak; . . .

198. The Army's failure to provide written notification to CDH within seven days of the detection of liquids in the leak detection systems of Pond A and Pond B constitutes two separate violations of 6 CCR 1007-3, Section 264.222 (b) (9-85).

199. The Army's failure to provide written notification to CDH within seven days of the detection of liquids in the leak detection system of the waste pile constitutes a violation of 6 CCR 1007-3; Section 264.252 (b) (9-85).

THIRTY-EIGHTH AND THIRTY-NINTH VIOLATIONS

(Failure to Remedy Deterioration and Malfunction of the Liners of the Leak Detection Systems for Pond A and the Waste Pile)

200. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 199 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

201. At the commencement of the May 1989 RCRA/CHWMA inspection, the Army had not implemented a program to remedy the deterioration or malfunction of the liners for Pond A despite knowing that liquids were in the systems since August 1988.

202. At the commencement of the May 1989 RCRA/

CHWMA inspection, the Army had not implemented a program to remedy the deterioration or malfunction of the liners for the waste pile despite knowing that liquids were in the systems since October 1988.

203. To date, the Army has not notified CDH of a program designed to remedy any deterioration or malfunction of the liners for Pond A and the Waste Pile.

Conclusions Of Law

204. 6 CCR 1007-3, Section 264.15 (c) (9-85) provides:

> (c) The owner or operator must remedy any deterioration or malfunction of equipment or structures which the inspection reveals on a schedule which ensures that the problem does not lead to an environmental or human health hazard. Where a hazard is imminent or has already occurred, remedial action must be taken immediately.

205. The Army's failure to implement a program to remedy the deterioration or malfunction of the liners for Pond A and the Waste Pile does not ensure that the problem does not lead to an environmental or health hazard and constitutes three separate violations of 6 CCR 1007-3, Section 264.15 (c) (9-85).

FORTIETH VIOLATION

(Failure to Have a Current Contingency Plan)

206. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 205 of this Final Compliance Order are incorporated by reference as though fully set forth below.

Findings Of Fact

207. On May 1, 1989 CDH representatives requested a copy of the contingency plan then applicable to the Arsenal including the Basin F hazardous waste management units. On that day, Mr. Strang of the Program Manager's Office provided CDH with copies of the January 1989 Spill Prevention Control and Countermeasure Plan (1989 SPCC), the January 1989 Installation Spill Contingency Plan (1989 ISCP), and the March 1, 1989 Emergency Notification Plan.

208. CDH later questioned whether the 1989 SPCC and 1989 ISCP were currently in effect and representatives of the Army indicated that these were draft plans.

209. The March 1, 1989 Emergency Notification Plan addresses only notification procedures and does not address emergency actions, arrangements agreed to with local response authorities, emergency equipment, emergency coordinators, and an evacuation plan for the facility.

210. On May 15, 1989, the Army provided for review additional plans purported to be "health and safety" plans. These were the 1984 SPCC, the April 1988 SHERP, Weekly Safety Reports 1 through 58, and the EBASCO Environmental Protection Plan.

211. On June 20, 1989, the Department of Justice delivered to the Colorado Attorney General's Office nine plans under the heading of "Emergency Plans."

212. On July 7, 1989, the Army delivered to CDH an O & M Plan which contained a draft document labeled "Contingency Plan for the Basin F Interim Response Action Structures Complex." This plan references numerous other emergency-related plans,

including but not limited to some of the plans submitted on June 20, 1989.

213. CDH asked on numerous occasions, in writing and orally, when each plan was or is in effect. To date, the Army has not provided a response.

214. The Army has not provided CDH a contingency plan which it claims to be currently in effect at the Arsenal which includes the Basin F hazardous waste management units.

Conclusions Of Law

215. 6 CCR 1007-3, Section 264.51 (10-87) provides, in part:

> (a) Each owner or operator must have a contingency plan for his facility. The contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste constituents to air, soil, surface or ground water.

216. The failure of the Army to have a contingency plan currently applicable at the Arsenal which covers the Basin F hazardous waste management units constitutes a violation of 6 CCR 1007-3, Section 264.51 (10-87).

FORTY-FIRST VIOLATION

(Failure to Submit Copies of a Contingency Plan to All Local Authorities)

217. The General Findings, Findings of Fact, and Conclusions of Law set forth in paragraphs 1 through 216 of this Final Compliance Order are incorporated by reference as though fully set forth below.

Findings Of Fact

218. On May 1, 1989 and thereafter, CDH representatives have requested documentation evidencing submittal of a contingency plan to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency services. To date, the Army has provided no such documentation.

219. On June 13 and 14, 1989 the following local authorities informed CDH that they had no copies of a contingency plan for the Arsenal: Brighton Fire Department; Commerce City Police Department; and Tri-County Health Department. CDH does not have a copy of the Arsenal's current contingency plan, if any exists. Fitzsimmons Medical Hospital informed CDH that it has a copy of the draft 1989 SPCC.

Conclusions of Law

220. 6 CCR 1007-3, Section 264.53 (b) provides:

> A copy of the contingency plan and all revisions to the plan must be:
> (b) Submitted to all local police departments, fire departments, hospitals, and State and local emergency response teams that may be called upon to provide emergency service.

221. The Army's failure to submit a copy of a contingency plan to all local authorities that may be called upon to provide emergency services constitutes a violation of 6 CCR 1007-3, Section 264.53 (10-87).

FORTY-SECOND VIOLATION

(Failure to Maintain Adequate Operating Records)

222. The General Findings, Findings of Fact, and

Conclusions of Law set forth in paragraphs 1 through 221 of this Final Compliance Order are incorporated by reference as though fully set forth herein.

Findings Of Fact

223. On May 1, 1989, inspectors for CDH requested all operating logs for Pond A, Pond B, the waste pile, and the three tanks.

224. On May 2, 1989, Mr. Berry provided representatives of CDH with a "Liquid Transfer Log" (LTL) and represented that this was part of the operating record. The LTL recorded the transfer of Basin F liquids from Basin F to the three hazardous waste storage tanks, Pond B, and Pond A, and from Pond B to Pond A.

225. The operating records presented by Mr. Berry on May 1, 1989, were not current; they were limited to hazardous waste transfer and storage from May 26, 1988 to September 25, 1988.

226. On May 1, 1989, Mr. Berry stated that leachate from the waste pile had been transferred to Pond A since September 25, 1988 and that liquids from the leak detection system of Pond A were pumped into Pond A.

227. On May 15, 1989, Mr. Berry stated that Basin F liquids from the Tank No. 2 spill and from drainage of Tank No. 2 were transferred to Pond A.

228. The operating records provided during the May 1989 RCRA/CHWMA inspection did not include a description and the quantity of each hazardous waste received, and the methods, dates, quantities and locations of its storage or transfers including but not limited to transfers from: the leachate collection system of the waste pile; the leak detection systems;

the Tank No. 2 spill; the decontamination of Pond B, the decontamination of equipment, and the decontamination of the tank farm secondary containment. Only a portion of this information was provided in documents delivered by the Department of Justice to the Colorado Attorney General's Office on June 20, 1989.

Conclusions Of Law

229. 6 CCR 1007-3, Section 264.73 (b) (9-88) provides, in part:

> (b) The following information must be recorded, as it becomes available, and maintained in the operating record until closure of the facility:
> (1) A description and the quantity of each hazardous waste received, and the method(s) and date(s) of its treatment, storage, or disposal at the facility as required by Appendix I;
> (2) The location of each hazardous waste at the facility and the quantity at each location....

230. The Army's failure to include the methods and dates of transfer and the location, quantities, and dates of storage of hazardous waste transferred from: the leachate collection system of the waste pile; the leak detection systems; the Tank No. 2 spill; the decontamination of Pond B, the decontamination of equipment, and the decontamination of the tank farm secondary containments constitutes a violation of 6 CCR 1007-3, Section 264.73 (b) (9-88).

ORDER

231. Based on the foregoing General Findings, Findings of Fact and Conclusions of Law, and pursuant to Section 25-15-308, C.R.S. (1982 & 1988 Supp.),

the Army is hereby ordered to comply with the following:

232. Pursuant to 6 CCR 1007-3, Section 265.112 (c) (4) (7-89), the Army shall submit an amended Basin F closure Plan ("Amended Basin F Closure Plan") to CDH within 60 days from the effective date of this Amended Compliance Order for CDH's review and approval. The Amended Basin F Closure Plan shall comply with all requirements of 6 CCR 1007-3, part 265, subpart G. To the extent not precluded by changed factual circumstances, the Amended Basin F Closure Plan shall be consistent with the terms and requirements contained in the October 1, 1986, Basin F Closure Plan. The Amended Basin F Closure Plan shall include but not be limited to, provisions for the following:

a. summary construction reports for the previous excavation and relocation of all hazardous wastes from Basin F, to the new RCRA/CHWMA units, i.e., the storage tanks, Pond A, Pond B, and the Basin F waste pile, if not previously provided pursuant to RCRA/CHWMA inspection;

b. an estimated volume of contaminated materials removed, if not previously provided pursuant to the RCRA/CHWMA inspection;

c. an evaluation of the data collected showing the extent of contaminants in soils beneath Basin F;

d. the volume and nature of materials placed in and the current volume and nature of materials contained in each of the above-mentioned new RCRA/CHWMA units;

e. a work plan to complete the evaluation of the nature and extent of soils contamination re-

maining in Basin F (not including the wastes in the waste pile);

f. proposed soil performance standards to be used to define the extent of residual contamination that would allow final closure of Basin F pursuant to 6 CCR 1007-3, Section 265.228 (a) (1) (9-88);

g. a proposed schedule for submittal of a work plan for remediation of soils remaining in Basin F to meet soil performance standards or closure as a landfill pursuant to 6 CCR 1007-3, Section 265.228 (a) (2) (9-88).

h. proposed schedule for submittal of work plans for final treatment/disposal of all Basin F liquid and solid hazardous wastes, such work plan shall provide for treatment/disposal of all wastes currently contained in the storage tanks, Pond A, and the waste pile as soon as technically feasible;

i. proposed schedule for submittal of closure plans for the closure of the storage tanks, Pond A, Pond B, and the waste pile and all other units containing Basin F hazardous wastes;

j. work plan for mitigation, monitoring, and control measures with respect to air emissions from all hazardous waste management units containing Basin F hazardous wastes, including vent controls on the tanks, Ponds A & B, and the waste pile, or in the alternative, data acceptable to CDH that these units are not emitting hazardous waste into the air; adequate on-post and off-post air monitoring; adequate worker protection measures; contingency plans for on-post and off-post human exposure to airborne hazardous

waste; and reduction of work areas and/or use of odor suppressants within Basin F in order to minimize air emissions when further cleanup work in Basin F is performed;

k. a work plan detailing an inspection and maintenance program for all hazardous waste management units containing Basin F hazardous wastes which is designed to ensure sufficient identification of problems in time to correct them before they can harm human health or the environment, and which complies with the inspection and monitoring requirements of 6 CCR 1007-3;

l. a work plan detailing additional ground water investigations with respect to the adequacy and proper siting of the Basin F Ground Water Intercept and Treatment System including, but not limited to, a complete evaluation of:

1) ground water contamination immediately downgradient of Basin F including the Denver formation and any additional plumes moving in a northwest direction;

2) ground water direction and flow rate immediately downgradient of Basin F and upgradient of the Rocky Mountain Arsenal northern boundary to identify all suitable locations for the Basin F Ground Water Intercept and Treatment System; and

3) the technical practicability of including the Upper Denver Aquifer in the Basin F Ground Water Intercept and Treatment System;

m. a work plan detailing the means and schedule for pumping out the leak detection systems of

Pond A, Pond B, and the waste pile and draining the liquids between the tank liners and tank walls; and

n. a work plan detailing the means for determining the cause of the presence of liquids containing Basin F hazardous waste constituents in the leak detection systems of Pond A, Pond B, the waste pile, and the presence of such liquids in the space between the interior liner and tank wall of the Basin F storage tanks.

233. The Army shall submit, as part of the Amended Basin F Closure Plan, schedules for submittal of work plans and closure plans.

234. The Army shall submit work plans and closure plans (and post-closure plans if determined necessary by CDH) for each unit containing Basin F hazardous waste pursuant to the schedules provided in the Amended Basin F Closure Plan and this Revised Order.

235. CDH shall review the work plans, closure plans, and post-closure plans and inform the Army in writing of its approval or disapproval of the work plans, closure plans, post-closure plans, or any part thereof. In the event of any disapproval, the written notice shall specify the reasons and any required modifications. The Army shall modify the work plans, closure plans, or post-closure plans to address CDH comments and submit the modified work plans to CDH within 15 days, the modified closure plans to CDH within 30 days, or the modified post-closure plans within 60 days of the date the Army receives CDH's notice.

236. The work plan for each phase or closure plan or post-closure plan for each unit containing Basin F

hazardous waste, once approved by CDH, will become a part of this Final Compliance Order.

237. The Army shall not implement any work plan, closure plan, or post-closure plan prior to approval by CDH.

238. The Army shall submit a complete report at the completion of work performed pursuant to an approved work plan, closure plan, or post-closure plan.

239. Within 30 days of the effective date of this Final Compliance Order the Army shall submit to CDH for review a contingency plan for the Arsenal which includes all hazardous waste management units containing Basin F hazardous wastes. The contingency plan shall fulfill the purpose defined in 6 CCR 1007-3 Sections, 264.51 and 265.51. Thus, the contingency plan shall be designed to minimize hazards to human health and the environment from fires, explosions, or any unplanned release of hazardous wastes to air, soil, surface water, or ground water. The contingency plan shall provide for immediate implementation in the event of a fire, explosion, or release of hazardous waste from all hazardous waste management units, including those units containing Basin F hazardous wastes, which could threaten human health or the environment.

240. The content of the contingency plan shall meet the requirements of 6 CCR 1007-3, Sections 264.52 and 265.52. Thus, the contingency plan shall include provisions for notification of local emergency response authorities, State and County health departments, and the State Division of Disaster and Emergency Services in the event that the facility has a release, fire, or explosion that could threaten hu-

man health or the environment outside the facility. For the purposes of the contingency plan, any catastrophic failure of any of the three Basin F hazardous waste storage tanks shall be deemed an event that threatens human health or the environment outside the facility. The plan shall provide for development with local and state agencies of off-site evacuation plans and response plans.

241. Review and resubmittal of the contingency plan shall be treated as for a work plan.

242. The contingency plan, once approved by CDH, shall become part of the Amended Basin F Closure Plan and a part of this Final Compliance Order.

243. Within 30 days of the effective date of this Final Compliance Order, the Army shall submit a work plan detailing the inspection plan of all hazardous waste management units containing Basin F hazardous waste, including Basin F. The inspection plan must meet all of the requirements of 6 CCR 1007-3, Sections 264.15, 264.195, 264.226, and 264.254. The results of the inspections shall be reported to CDH monthly.

244. The portion of the inspection plan addressing Basin F must include an operation and maintenance schedule which shall:

(a) Maintain the integrity and effectiveness of the soil cover including making repairs to the cover as necessary to correct the effects of settling, subsidence, erosion, or other events;

(b) Maintain and monitor the ground water monitoring system; and

(c) Prevent run-on and run-off from eroding or otherwise damaging the Basin F cover.

245. The portion of the inspection plan addressing the three tanks containing Basin F hazardous waste must meet the requirements of 6 CCR 1007-3, Section 264.195 (7-89). Pursuant to 6 CCR 1007-3, Section 264.15(b) (7-89), this portion of the inspection plan shall take into account the corrosion of the tanks' walls due to contact of the tank walls with liquids containing Basin F hazardous waste constituents. Thus, details of inspection plans for corrosion of the tank walls (*i.e.*, ultrasonic testing) shall be provided.

246. The portion of the inspection plan addressing Pond A and Pond B must meet the requirements of 6 CCR 1007-3, Section 264.226(b) (9-85). Pursuant to 6 CCR 1007-3, Section 264.15(b) (7-89), this portion of the inspection plan shall take into account the possible deterioration or malfunction of the liners. Thus, inspection measures additional to those required in section 264.226(b) may be necessary.

247. The portion of the inspection plan addressing the Basin F waste pile must meet the requirements of 6 CCR 1007-3, Section 264.254(b) (9-85). Pursuant to 6 CCR 1007-3, Section 264.15(b) (7-89), this portion of the inspection plan shall take into account the possible deterioration or malfunction of the liners. Thus, inspection measures additional to those required in section 264.254(b) may be necessary.

248. The inspection plan, once approved by CDH, shall become part of the Amended Basin F Closure Plan and a part of this Final Compliance Order.

249. On the effective date of this Final Compliance Order, the Army shall submit to CDH for approval a work plan for pumping out the leak detec-

tion systems of Pond A, Pond B, and the waste pile and draining the liquids between the tank liners and tank walls. The amounts and dates of liquids pumped or drained shall be reported to CDH monthly.

250. The work plan for pumping out the leak detections systems, once approved by CDH, shall become part of the Amended Basin F Closure Plan and this Final Compliance Order.

251. Within 30 days of the effective date of this Final Compliance Order, the Army must submit to CDH, for approval, a work plan for determining the cause of the presence of liquids containing Basin F hazardous waste constituents in the leak detection systems of Pond A, Pond B, the waste pile, and the presence of such liquids in the space between the interior liner and tank wall of the three Basin F storage tanks.

252. The work plan for determining the cause of the presence of liquids in leak detection systems and the space between the tank liners and tank walls, once approved by CDH, shall become part of the Amended Closure Plan and this Final Compliance Order.

253. The Army shall pay all document review fees for: the Amended Basin F Closure Plan required pursuant to this Final Compliance Order; all other plans submitted pursuant to the Amended Basin F Closure Plan; and any post-closure plan required by CDH, consistent with 6 CCR 1007-3, Section 100.32 (1-88).

254. Within 60 days of the effective date of this Final Compliance Order, the Army shall pay in full all unpaid annual operating fees, waste volume fees,

and annual fees for which the Arsenal previously has been billed.

255. Within 10 days of the effective date of this Final Compliance Order, the Army shall submit a revised Part A permit application to CDH which includes all units currently containing Basin F hazardous waste. The Army shall subsequently amend the Part A permit application, as appropriate, in order to include any additional units which treat, store, or dispose of Basin F hazardous waste.

256. On the effective date of this Final Compliance Order the Army shall provide, to the extent not previously provided pursuant to or subsequent to the May 1989 RCRA/CHWMA inspection, all of the following:

a. all final as-built drawings of the three Basin F tanks, Pond A and Pond B, and the waste pile.

b. all construction specifications and plans for the three Basin F tanks, Pond A, Pond B, the waste pile.

c. all logs containing levels in the sumps for the leak detection systems and leachate collection systems for Pond A, Pond B, and the waste pile from the date hazardous waste was placed in each unit until the effective date of this Final Compliance Order.

d. all logs which contain information regarding the dates and/or amounts pumped from the leak detection systems and leachate collection systems for Pond A, Pond B, and the waste pile from the date hazardous waste was placed in each unit until the effective date of this Final Compliance Order.

e. all logs which contain information regarding the dates and/or amounts removed from the space between the interior tank liner and the tank wall for the Basin F tanks.

f. all data regarding the analysis of liquids pumped from the leak detection systems and leachate collection systems for Pond A, Pond B, and the waste pile from the date Basin F hazardous waste was placed in each unit until the effective date of this Final Compliance Order.

g. all data regarding the analysis of liquids removed from the space between the interior tank liner and the tank wall for the Basin F tanks from the date hazardous waste was placed in each tank until the effective date of this Final Compliance Order.

h. all documents relating to the testing of the three tanks' walls since the release from Tank No. 2.

i. all contingency plans which cover Pond A, Pond B, the tanks, and the waste pile and which are currently in effect, if any and state the dates that each contingency plan was effective.

j. the Army has claimed throughout the RCRA/CHWMA inspection that the Army has inspected the leak detection and leachate collection systems pursuant to an "O & M Plan." A copy of this plan is required.

k. ground water monitoring data and plans which are used to indicate whether or not Pond A, Pond B, and the waste pile are affecting the ground water.

l. records of any program that the Army has in place to determine whether or not each unit has had a release into the environment.

m. all documents relating to the choice of material, design, construction, installation, and qa/qc procedures for the three tanks and their internal liners and the liners for Ponds A and B and the waste pile.

257. In addition, the Army shall make available for inspection by CDH all documents which are re-

quired to be maintained by 6 CCR 1007-3, no later than the effective date of this Final Compliance Order.

258. Within 30 days of the effective date of this Final Compliance Order, the Army shall complete construction of an emergency containment structure surrounding the three Basin F storage tanks. The containment structure must be designed to contain the total content of the three tanks without experiencing overtopping or structural failure in the event of a catastrophic failure of the three tanks.

259. CDH reserves the right to impose such further conditions as necessary to ensure compliance with the Colorado Hazardous Waste Management Act, the 6 CCR 1007-3 regulations, and this Final Compliance Order.

NOTICE OF LIABILITY FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

Section 25-15-309, C.R.S. (1982), provides that any person who violates the Colorado Hazardous Waste Management Act, Sections 25-15-301 through 313, C.R.S. (1982 & 1988 Supp.), the regulations implementing the Act, 6 CCR 1007-3, or any compliance order of CDH which is not subject to a stay pending judicial review, shall be subject to a civil penalty of not more than $25,000 per violation for each day during which such violation occurs. The Army may be subject to suit for injunctive relief or civil penalties or both for failure to comply with Section 25-15-308 and this Final Compliance Order.

NOTICE OF EFFECTIVE DATE OF ORDER

This Final Compliance Order shall become effective 21 calendar days after receipt. The Final Compliance Order deadlines will remain as stated herein unless modified by an Administrative Law Judge or as otherwise provided by law. If you have any questions regarding this Final Compliance Order, contact

Frederick R. Dowsett
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Date: 9/1/89 By: /s/ Frederick R. Dowsett
FREDERICK R. DOWSETT
Unit Leader
Monitoring and Enforcement

Reviewed and Concurred In:

Date: 9/1/89 By /s/ David C. Shelton
DAVID C. SHELTON
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APPENDIX G

STATUTORY PROVISIONS INVOLVED

Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.*, provides in relevant part:

§ 9601. Definitions

For purposes of this subchapter—

* * * * *

(23) The terms "remove" or "removal" means [*sic*] the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary [*sic*] to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act (42 U.S.C. 5121 et seq.).

(24) The terms "remedy" or "remedial action" means [*sic*] those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and

offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

(25) The terms "respond" or "response" means [*sic*] remove, removal, remedy, and remedial action;, [*sic*] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

42 U.S.C. 9601(23)-(25).

Section 113(h) and (j) of CERCLA provide in relevant part:

§ 9613. Civil Proceedings

* * * * *

(h) **Timing of Review**

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following:

(1) An action under section 9607 of this title to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 9606(b)(2) of this title.

(4) An action under section 9659 of this title (relating to citizens suits) alleging that the removal or remedial action taken under section 9604 of this title or secured under section 9606 of this title was in violation of any requirement of this chapter. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

(j) **Judicial review**

(1) **Limitation**

In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) **Standard**

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

(3) **Remedy**

If the court finds that the selection of the response action was arbitrary and capricious

or otherwise not in accordance with law, the court shall award (A) only the response costs or damages that are not inconsistent with the national contingency plan, and (B) such other relief as is consistent with the National Contingency Plan.

(4) **Procedural errors**

In reviewing alleged procedural errors, the court may disallow costs or damages only if the errors were so serious and related to matters of such central relevance to the action that the action would have been significantly changed had such errors not been made.

42 U.S.C. 9613(h) and (j).

Section 114(a) of CERCLA provides:

§ 9614. Relationship to other law

(a) Additional State liability or requirements with respect to release of substances within State

Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. 9614(a).

Section 120 of CERCLA provides:

§ 9620. Federal facilities

(a) Application of chapter to Federal Government

(1) **In general**

Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under sections 9606 and 9607 of this title.

(2) **Application of requirements to Federal facilities**

All guidelines, rules, regulations, and criteria which are applicable to preliminary assessments carried out under this chapter for facilities at which hazardous substances are located, applicable to evaluations of such facilities under the National Contingency Plan, applicable to inclusion on the National Priorities List, or applicable to remedial actions at such facilities shall also be applicable to facilities which are owned or operated by a department, agency, or instrumentality of the United States in the same manner and to the extent as such guidelines, rules, regulations, and criteria are applicable to other facilities. No department, agency, or instrumentality of the United States may adopt or utilize any such guidelines, rules, regulations, or criteria which are inconsistent with the guidelines, rules, regulations, and criteria established by the Administrator under this chapter.

(3) **Exceptions**

This subsection shall not apply to the extent otherwise provided in this section with respect to applicable time periods. This subsection shall also not apply to any requirements relating to bonding, insurance, or financial responsibility. Nothing in this chapter shall be construed to require a State to comply with section 9604(c)(3) of this title in the case of a facility which is owned or operated by any department, agency, or instrumentality of the United States.

(4) **State laws**

State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. The preceding sentence shall not apply to the extent a State law would apply any standard or requirement to such facilities which is more stringent than the standards and requirements applicable to facilities which are not owned or operated by any such department, agency, or instrumentality.

(b) **Notice**

Each department, agency, and instrumentality of the United States shall add to the inventory of Federal agency hazardous waste facilities required to be submitted under section 3016 of the Solid Waste Disposal Act (42 U.S.C. 6937) (in addition to the information required under section 3016(a)(3) of such Act (42 U.S.C.

6937(a)(3))) information on contamination from each facility owned or operated by the department, agency, or instrumentality if such contamination affects contiguous or adjacent property owned by the department, agency, or instrumentality or by any other person, including a description of the monitoring data obtained.

(c) **Federal Agency Hazardous Waste Compliance Docket**

The Administrator shall establish a special Federal Agency Hazardous Waste Compliance Docket (hereinafter in this section referred to as the "docket") which shall contain each of the following:

(1) All information submitted under section 3016 of the Solid Waste Disposal Act (42 U.S.C. 6937) and subsection (b) of this section regarding any Federal facility and notice of each subsequent action taken under this chapter with respect to the facility.

(2) Information submitted by each department, agency, or instrumentality of the United States under section 3005 or 3010 of such Act (42 U.S.C. 6925, 6930).

(3) Information submitted by the department, agency, or instrumentality under section 9603 of this title.

The docket shall be available for public inspection at reasonable times. Six months after establishment of the docket and every 6 months thereafter, the Administrator shall publish in the Federal Register a list of the Federal facilities which have been included in the

docket during the immediately preceding 6-month period. Such publication shall also indicate where in the appropriate regional office of the Environmental Protection Agency additional information may be obtained with respect to any facility on the docket. The Administrator shall establish a program to provide information to the public with respect to facilities which are included in the docket under this subsection.

(d) **Assessment and evaluation**

Not later than 18 months after October 17, 1986, the Administrator shall take steps to assure that a preliminary assessment is conducted for each facility on the docket. Following such preliminary assessment, the Administrator shall, where appropriate—

(1) evaluate such facilities in accordance with the criteria established in accordance with section 9605 of this title under the National Contingency Plan for determining priorities among releases; and

(2) include such facilities on the National Priorities List maintained under such plan if the facility meets such criteria.

Such criteria shall be applied in the same manner as the criteria are applied to facilities which are owned or operated by other persons. Evaluation and listing under this subsection shall be completed not later than 30 months after October 17, 1986. Upon the receipt of a petition from the Governor of any State, the Administrator shall make such an evaluation of any facility included in the docket.

(e) **Required action by department**

(1) **RI/FS**

Not later than 6 months after the inclusion of any facility on the National Priorities List, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence a remedial investigation and feasibility study for such facility. In the case of any facility which is listed on such list before October 17, 1986, the department, agency, or instrumentality which owns or operates such facility shall, in consultation with the Administrator and appropriate State authorities, commence such an investigation and study for such facility within one year after October 17, 1986. The Administrator and appropriate State authorities shall publish a timetable and deadlines for expeditious completion of such investigation and study.

(2) **Commencement of remedial action; interagency agreement**

The Administrator shall review the results of each investigation and study conducted as provided in paragraph (1). Within 180 days thereafter, the head of the department, agency, or instrumentality concerned shall enter into an interagency agreement with the Administrator for the expeditious completion by such department, agency, or instrumentality of all necessary remedial action at such facility. Substantial continuous physical onsite remedial action shall be commenced at each facility not later than 15 months after completion of the

investigation and study. All such interagency agreements, including review of alternative remedial action plans and selection of remedial action, shall comply with the public participation requirements of section 9617 of this title.

(3) **Completion of remedial actions**

Remedial actions at facilities subject to interagency agreements under this section shall be completed as expeditiously as practicable. Each agency shall include in its annual budget submissions to the Congress a review of alternative agency funding which could be used to provide for the costs of remedial action. The budget submission shall also include a statement of the hazard posed by the facility to human health, welfare, and the environment and identify the specific consequences of failure to begin and complete remedial action.

(4) **Contents of agreement**

Each interagency agreement under this subsection shall include, but shall not be limited to, each of the following:

(A) A review of alternative remedial actions and selection of a remedial action by the head of the relevant department, agency, or instrumentality and the Administrator or, if unable to reach agreement on selection of a remedial action, selection by the Administrator.

(B) A schedule for the completion of each such remedial action.

(C) Arrangements for long-term operation and maintenance of the facility.

(5) **Annual report**

Each department, agency, or instrumentality responsible for compliance with this section shall furnish an annual report to the Congress concerning its progress in implementing the requirements of this section. Such reports shall include, but shall not be limited to, each of the following items:

(A) A report on the progress in reaching interagency agreements under this section.

(B) The specific cost estimates and budgetary proposals involved in each interagency agreement.

(C) A brief summary of the public comments regarding each proposed interagency agreement.

(D) A description of the instances in which no agreement was reached.

(E) A report on progress in conducting investigations and studies under paragraph (1).

(F) A report on progress in conducting remedial actions.

(G) A report on progress in conducting remedial action at facilities which are not listed on the National Priorities List.

With respect to instances in which no agreement was reached within the required time period, the department, agency, or instrumentality filing the report under this paragraph shall include in such report an explanation of the reasons why no

agreement was reached. The annual report required by this paragraph shall also contain a detailed description on a State-by-State basis of the status of each facility subject to this section, including a description of the hazard presented by each facility, plans and schedules for initiating and completing response action, enforcement status (where appropriate), and an explanation of any postponements or failure to complete response action. Such reports shall also be submitted to the affected States.

(6) **Settlements with other parties**

If the Administrator, in consultation with the head of the relevant department, agency, or instrumentality of the United States, determines that remedial investigations and feasibility studies or remedial action will be done properly at the Federal facility by another potentially responsible party within the deadlines provided in paragraphs (1), (2), and (3) of this subsection, the Administrator may enter into an agreement with such party under section 9622 of this title (relating to settlements). Following approval by the Attorney General of any such agreement relating to a remedial action, the agreement shall be entered in the appropriate United States district court as a consent decree under section 9606 of this title.

(f) **State and local participation**

The Administrator and each department, agency, or instrumentality responsible for compliance with this section shall afford to relevant

State and local officials the opportunity to participate in the planning and selection of the remedial action, including but not limited to the review of all applicable data as it becomes available and the development of studies, reports, and action plans. In the case of State officials, the opportunity to participate shall be provided in accordance with section 9621 of this title.

(g) **Transfer of authorities**

Except for authorities which are delegated by the Administrator to an officer or employee of the Environmental Protection Agency, no authority vested in the Administrator under this section may be transferred, by executive order of the President or otherwise, to any other officer or employee of the United States or to any other person.

(h) **Property transferred by Federal agencies**

(1) **Notice**

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, whenever any department, agency, or instrumentality of the United States enters into any contract for the sale or other transfer of real property which is owned by the United States and on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, the head of such department, agency, or instrumentality shall include in such contract notice of the type and quantity of such hazardous substance and notice of the time at which such storage, release, or disposal took place, to the extent

such information is available on the basis of a complete search of agency files.

(2) **Form of notice; regulations**

Notice under this subsection shall be provided in such form and manner as may be provided in regulations promulgated by the Administrator. As promptly as practicable after October 17, 1986, but not later than 18 months after October 17, 1986, and after consultation with the Administrator of the General Services Administration, the Administrator shall promulgate regulations regarding the notice required to be provided under this subsection.

(3) **Contents of certain deeds**

After the last day of the 6-month period beginning on the effective date of regulations under paragraph (2) of this subsection, in the case of any real property owned by the United States on which any hazardous substance was stored for one year or more, known to have been released, or disposed of, each deed entered into for the transfer of such property by the United States to any other person or entity shall contain—

(A) to the extent such information is available on the basis of a complete search of agency files—

(i) a notice of the type and quantity of such hazardous substances,

(ii) notice of the time at which such storage, release, or disposal took place, and

(iii) a description of the remedial action taken, if any, and

(B) a covenant warranting that—

(i) all remedial action necessary to protect human health and the environment with respect to any such substance remaining on the property has been taken before the date of such transfer, and

(ii) any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States.

The requirements of subparagraph (B) shall not apply in any case in which the person or entity to whom the property is transferred is a potentially responsible party with respect to such real property.

(i) **Obligations under Solid Waste Disposal Act**

Nothing in this section shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) (including corrective action requirements).

(j) **National security**

(1) **Site specific Presidential orders**

The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protect the national security interests of the

United States at that site or facility. Such orders may include, where necessary to protect such interests, an exemption from any requirement contained in this subchapter or under title III of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11001 et seq.) with respect to the site or facility concerned. The President shall notify the Congress within 30 days of the issuance of an order under this paragraph providing for any such exemption. Such notification shall include a statement of the reasons for the granting of the exemption. An exemption under this paragraph shall be for a specified period which may not exceed one year. Additional exemptions may be granted, each upon the President's issuance of a new order under this paragraph for the site or facility concerned. Each such additional exemption shall be for a specified period which may not exceed one year. It is the intention of the Congress that whenever an exemption is issued under this paragraph the response action shall proceed as expeditiously as practicable. The Congress shall be notified periodically of the progress of any response action with respect to which an exemption has been issued under this paragraph. No exemption shall be granted under this paragraph due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation.

(2) **Classified information**

Notwithstanding any other provision of law, all requirements of the Atomic Energy Act (42 U.S.C. 2011 et seq.) and all Executive orders concerning the handling of restricted data and national security information, including "need to know" requirements, shall be applicable to any grant of access to classified information under the provisions of this chapter or under title III of the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. 11001 et seq.).

42 U.S.C. 9620.

Section 121 of CERCLA provides:

§ 9621. Cleanup standards

(a) **Selection of remedial action**

The President shall select appropriate remedial actions determined to be necessary to be carried out under section 9604 of this title or secured under section 9606 of this title which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response. In evaluating the cost effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

(b) General rules

(1) Remedial actions in which treatment which permanently and significantly reduces the volume,

toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The President shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the President shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the President shall, at a minimum, take into account:

(A) the long-term uncertainties associated with land disposal;

(B) the goals, objectives, and requirements of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;

(D) short- and long-term potential for adverse health effects from human exposure;

(E) long-term maintenance costs;

(F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and

(G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If the President selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected.

(2) The President may select an alternative remedial action meeting the objectives of this subsection whether or not such action has been achieved in practice at any other facility or site that has similar characteristics. In making such a selection, the President may take into account the degree of support for such remedial action by parties interested in such site.

(c) **Review**

If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if

upon such review it is the judgment of the President that action is appropriate at such site in accordance with section 9604 or 9606 of this title, the President shall take or require such action. The President shall report to the Congress a list of facilities for which such review is required, the results of all such reviews, and any actions taken as a result of such reviews.

(d) **Degree of cleanup**

(1) Remedial actions selected under this section or otherwise required or agreed to by the President under this chapter shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if—

(i) any standard, requirement, criteria, or limitation under any Federal environmental law, including, but not limited to, the Toxic Substances Control Act (15 U.S.C. 2601 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), the Clean Water Act (33 U. S.C. 1251 et seq.), the Marine Protection, Research and Sanctuaries Act (33 U. S.C. 1401 et seq.), or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.); or

(ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria, or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 9604 of this title or secured under section 9606 of this title shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act (42 U.S.C. 300f et seq.) and water quality criteria established under section 304 or 303 of the Clean Water Act (33 U.S.C. 1314, 1313), where such goals or criteria are relevant and appropriate under the circumstances of the release or threatened release.

(B)(i) In determining whether or not any water quality criteria under the Clean Water Act (33

U.S.C. 1251 et seq.) is relevant and appropriate under the circumstances of the release or threatened release, the President shall consider the designated or potential use of the surface or groundwater, the environmental media affected, the purposes for which such criteria were developed, and the latest information available.

(ii) For the purposes of this section, a process for establishing alternate concentration limits to those otherwise applicable for hazardous constituents in groundwater under subparagraph (A) may not be used to establish applicable standards under this paragraph if the process assumes a point of human exposure beyond the boundary of the facility, as defined at the conclusion of the remedial investigation and feasibility study, except where --

(I) there are known and projected points of entry of such groundwater into surface water; and

(II) on the basis of measurements or projections, there is or will be no statistically significant increase of such constituents from such groundwater in such surface water at the point of entry or at any point where there is reason to believe accumulation of constituents may occur downstream; and

(III) the remedial action includes enforceable measures that will preclude human exposure to the contaminated groundwater at any point between the facility boundary and all known and projected points of entry of such groundwater into surface water

then the assumed point of human exposure may be at such known and projected points of entry.

(C)(i) Clause (ii) of this subparagraph shall be applicable only in cases where, due to the President's selection, in compliance with subsection (b)(1) of this section, of a proposed remedial action which does not permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances, pollutants, or contaminants, the proposed disposition of waste generated by or associated with the remedial action selected by the President is land disposal in a State referred to in clause (ii).

(ii) Except as provided in clauses (iii) and (iv), a State standard, requirement, criteria, or limitation (including any State siting standard or requirement) which could effectively result in the statewide prohibition of land disposal of hazardous substances, pollutants, or contaminants shall not apply.

(iii) Any State standard, requirement, criteria, or limitation referred to in clause (ii) shall apply where each of the following conditions is met:

(I) The State standard, requirement, criteria, or limitation is of general applicability and was adopted by formal means.

(II) The State standard, requirement, criteria, or limitation was adopted on the basis of hydrologic, geologic, or other relevant considerations and was not adopted for the purpose of precluding onsite remedial actions or other land disposal for reasons unrelated to protection of human health and the environment.

(III) The State arranges for, and assures payment of the incremental costs of utilizing, a facility for disposition of the hazardous substances, pollutants, or contaminants concerned.

(iv) Where the remedial action selected by the President does not conform to a State standard and the State has initiated a law suit against the Environmental Protection Agency prior to May 1, 1986, to seek to have the remedial action conform to such standard, the President shall conform the remedial action to the State standard. The State shall assure the availability of an offsite facility for such remedial action.

(3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act (42 U.S.C. 6924, 6925) (or, where applicable, in compliance with the Toxic Substances Control Act (15 U.S.C. 2601 et seq.) or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:

(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.

(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.).

The President shall notify the owner or operator of such facility of determinations under this paragraph.

(4) The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation as required by paragraph (2) (including subparagraph (B) thereof), if the President finds that—

(A) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

(B) compliance with such requirement at that facility will result in greater risk to human health and the environment than alternative options;

(C) compliance with such requirements is technically impracticable from an engineering perspective;

(D) the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach;

(E) with respect to a State standard, requirement, criteria, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criteria, or limitation in similar circumstances at other remedial actions within the State; or

(F) in the case of a remedial action to be undertaken solely under section 9604 of this title using the Fund, selection of a remedial action that attains such level or standard of control will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats.

The President shall publish such findings, together with an explanation and appropriate documentation.

(e) **Permits and enforcement**

(1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

(2) A State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is

located. Any consent decree shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate Federal and State agencies. Where the parties agree, the consent decree may provide for administrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree.

(f) **State involvement**

(1) The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State. The regulations, at a minimum, shall include each of the following:

(A) State involvement in decisions whether to perform a preliminary assessment and site inspection.

(B) Allocation of responsibility for hazard ranking system scoring.

(C) State concurrence in deleting sites from the National Priorities List.

(D) State participation in the long-term planning process for all remedial sites within the State.

(E) A reasonable opportunity for States to review and comment on each of the following:

(i) The remedial investigation and feasibility study and all data and technical documents leading to its issuance.

(ii) The planned remedial action identified in the remedial investigation and feasibility study.

(iii) The engineering design following selection of the final remedial action.

(iv) Other technical data and reports relating to implementation of the remedy.

(v) Any proposed finding or decision by the President to exercise the authority of subsection (d)(4) of this section.

(F) Notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State and an opportunity to participate in such negotiations and, subject to paragraph (2), be a party to any settlement.

(G) Notice to the State and an opportunity to comment on the President's proposed plan for remedial action as well as on alternative plans under consideration. The President's proposed decision regarding the selection of remedial action shall be accompanied by a response to the comments submitted by the State, including an explanation regarding any decision under subsection (d)(4) of this section on compliance with promulgated State standards. A copy of

such response shall also be provided to the State.

(H) Prompt notice and explanation of each proposed action to the State in which the facility is located.

Prior to the promulgation of such regulations, the President shall provide notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State, and such State may participate in such negotiations and, subject to paragraph (2), any settlements.

(2)(A) This paragraph shall apply to remedial actions secured under section 9606 of this title. At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree.

(B) If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 9606 of this title before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard, requirement,

criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.

(C) The President may conclude settlement negotiations with potentially responsible parties without State concurrence.

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4) of this section, the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have

the remedial action conform to such standard, requirement~~, criteria~~, or limitation, the State may maintain an action as follows:

(i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.

(ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.

(iii) If the State fails to establish that the President's finding was not supported by substantial evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation.

42 U.S.C. 9621.

Section 122(e)(6) of CERCLA provides:

§ 9622. Settlements

* * * * *

(e) **Special notice provisions**

* * * * *

(6) **Inconsistent response action**

When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this chapter, has initiated a remedial investigation and feasibility study for a particular facility under this chapter, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

42 U.S.C. 9622(e)(6).

Section 302(d) of CERCLA provides in relevant part:

§ 9652. Effective dates; savings provisions

(d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants. * * *

42 U.S.C. 9652(d).